No. 06-1646
Title: United States, Petitioner
v.
Gino Gonzaga Rodriquez
Docketed: June 11, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-30397, 04-30494)
Decision Date: October 5, 2006
Rehearing Denied: January 12, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 29 2007	Application (06A929) to extend the time to file a petition for a writ of certiorari from April 12, 2007 to May 12, 2007, submitted to Justice Kennedy.
Mar 29 2007	Application (06A929) granted by Justice Kennedy extending the time to file until May 12, 2007.
May 2 2007	Application (06A929) to extend further the time from May 12, 2007 to June 11, 2007, submitted to Justice Kennedy.
May 2 2007	Application (06A929) granted by Justice Kennedy extending the time to file until June 11, 2007.
Jun 11 2007	Petition for a writ of certiorari filed. (Response due July 11, 2007)
Jul 5 2007	Order extending time to file response to petition to and including August 10, 2007.
Aug 10 2007	Brief of respondent Gino Gonzaga Rodriquez in opposition filed.
Aug 22 2007	DISTRIBUTED for Conference of September 24, 2007.
Aug 22 2007	Reply of petitioner United States filed. (Distributed)
Sep 25 2007	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of amici curiae are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.
Nov 5 2007	Joint appendix filed. (Statement of costs received.)
Nov 5 2007	Brief of petitioner United States filed.
Nov 16 2007	SET FOR ARGUMENT ON Tuesday, January 15, 2008.
Dec 3 2007	Record received from U.S.C.A. for the Ninth Circuit. (1 envelope) (U.S. District record is electronically filed. No hard copy).
Dec 3 2007	Brief of respondent Gino Gonzaga Rodriquez filed.
Dec 10 2007	Brief amicus curiae of Professors of Criminal Law filed.
Dec 10 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 12 2007	CIRCULATED.
Dec 14 2007	Application (07A471) to extend the time to file petitioner's reply brief on the merits from December 28, 2007 to January 4, 2008, submitted to Justice Kennedy.
Dec 14 2007	Application (07A471) granted by Justice Kennedy extending the time to file petitioner's

	reply brief on the merits until January 4, 2008.
Jan 4 2008	Reply of petitioner United States filed. (Distributed)
Jan 15 2008	Argued. For petitioner: Kannon K. Shanmugam, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Charles A. Rothfeld, Washington, D.C.

Supreme Court, U.S.
FILED
061646 JUN 11 2007
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, *inter alia*, a state-law controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(i). The question presented is:

Whether a state drug-trafficking offense, for which state law authorized a ten-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. 924(e) (2000 & Supp. IV 2004).

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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GINO GONZAGA RODRIQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 464 F.3d 1072. The sentencing order of the district court (App., *infra*, 18a-28a) is unreported.

JURISDICTION

The court of appeals entered its judgment on October 5, 2006. A petition for rehearing was denied on January 12, 2007 (App., *infra*, 29a-30a). On March 29, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 12, 2007. On May 2, 2007, Justice Kennedy further ex-

tended the time to June 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The relevant provisions of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), and of Washington's controlled-substances law are reproduced at App., *infra*, 31a-36a.

STATEMENT

Following a jury trial, respondent was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). At sentencing, the district court declined to impose an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA). Respondent instead was sentenced to 92 months of imprisonment, to be followed by three years of supervised release. The government appealed, and the court of appeals affirmed.

1. The ACCA mandates a minimum term of 15 years of imprisonment, and authorizes a maximum term of life imprisonment for anyone who has been convicted of being a felon in possession of a firearm and who has three previous convictions for "a violent felony or * * * serious drug offense, or both." 18 U.S.C. 924(e)(1) (Supp. IV 2004). The ACCA defines "serious drug offense" to include certain state-law controlled substance offenses "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

2. a. Respondent has several state-law felony convictions, including two California convictions for burglary and three convictions in Washington State for delivery of a controlled substance. App., *infra*, 2a, 4a-5a. Upon his release from prison in Washington, respondent was placed on a term of community supervision, from

which he absconded. In April 2003, respondent was apprehended, and a search of respondent incident to arrest uncovered a bag of heroin and approximately $900 in cash. *Id.* at 2a-3a. In a subsequent search of the residence in which respondent was residing, officers found a semi-automatic pistol. *Id.* at 4a; Gov't C.A. Br. 12.

A grand jury in the Eastern District of Washington returned a one-count indictment charging respondent with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e) (2000 & Supp. IV 2004). Respondent was convicted following a jury trial. App, *infra*, 4a.

b. At sentencing, the government argued that, although respondent's felon-in-possession offense ordinarily carried a maximum sentence of ten years, the designation of respondent as an armed career criminal triggered a minimum sentence of 15 years, and a maximum life sentence, pursuant to 18 U.S.C. 924(e) (2000 & Supp. IV 2004). As predicate offenses for respondent's armed career criminal status, the government relied on respondent's prior burglary and controlled substance convictions. App., *infra*, 20a-23a.

With respect to each of the three prior drug offenses, respondent had been convicted of violating Revised Code of Washington § 69.50.401 (1994), which prohibits the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance. App., *infra*, 10a. For each offense, he had pleaded guilty to "Delivery of a Controlled Substance Narcotic from Schedule III-V," which is a class C felony. C.A. Supp. E.R. 128, 147, 182.

Under Washington law, a class C controlled-substances felony is generally punishable by a maximum sentence of five years. Wash. Rev. Code

§ 9A.20.021(1)(c) (1994). Under Washington's controlled substances law, however, "[a]ny person convicted of a second or subsequent [drug] offense" faces a maximum sentence that is double the term otherwise authorized, making the maximum sentence for a class C felony ten years. *Id.* § 69.50.408(a) and (b).[1] Because of his repeated drug convictions, three of respondent's drug offenses constituted "second or subsequent offense[s]" that subjected him to a ten-year maximum sentence under Washington law. See C.A. Supp. E.R. 129, 148, 183.

The district court denied the armed career criminal enhancement. The court agreed with the government that both of respondent's burglary convictions constituted "violent felonies" under the ACCA. App., *infra*, 5a, 20a-22a; see generally *Taylor* v. *United States*, 495 U.S. 575 (1990). The district court rejected, however, the use of respondent's Washington controlled substance convictions as predicates for an ACCA enhancement. Relying on *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), the district court held that the "maximum term of imprisonment" for each

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[1] The Revised Code of Washington § 69.50.408(a) and (b) (1994) provides:

> (a) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.
>
> (b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

of the drug convictions had to be determined without reference to the recidivist sentencing provision. App., *infra*, 5a, 11a, 23a-27a.

In *Corona-Sanchez*, the Ninth Circuit had addressed, for federal sentencing purposes, whether a California petty theft offense constituted an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, which would increase the defendant's base offense level under Sentencing Guidelines § 2L1.2(b)(1)(A). See 291 F.3d at 1202, 1203, 1208-1211. That determination turned on whether the theft offense was punished by a term of imprisonment of "at least one year." 8 U.S.C. 1101(a)(43)(G); Sentencing Guidelines § 2L1.2(b)(1)(A). While the petty theft statute at issue in *Corona-Sanchez* provided a maximum sentence of only six months for first offenders, Corona-Sanchez, a recidivist offender, was sentenced to two years of imprisonment. *Corona-Sanchez*, 291 F.3d at 1208.

The en banc Ninth Circuit concluded that, in determining the length of the sentence for purposes of applying the unlawful-entry guideline, the state recidivism statute must be disregarded, and the court could consider only the six-month maximum that California law provided for the offense of conviction for a first offender. *Corona-Sanchez*, 291 F.3d at 1208-1209. In so holding, the court reasoned that, under *Taylor* v. *United States*, *supra*, courts were required "to examine the prior crimes by considering the statutory definetion of the crimes categorically, without reference 'to the particular facts underlying those convictions,'" and therefore the court was obligated to "consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Corona-Sanchez*, 291 F.3d at 1208-1209 (quoting *Taylor*,

495 U.S. at 600). The court of appeals also considered its approach to be consistent with "the Supreme Court's historic separation of recidivism and substantive crimes." *Id.* at 1209 (citing *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); *Almendarez- Torres* v. *United States*, 523 U.S. 224 (1998)).

Without the ACCA enhancement, the district court imposed a prison sentence of 92 months, to be followed by three years of supervised release. See J. and Sentence, *reprinted at* C.A. E.R. 6-7.

3. The government appealed, and the court of appeals affirmed. App., *infra*, 1a-17a.[2] The court concluded that, under *Corona-Sanchez*, "when we consider the prison term imposed for a prior offense, 'we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.'" *Id.* at 11a (quoting *Corona-Sanchez*, 291 F.3d at 1209). The court thus considered only the five-year penalty provided for Washington class C felony convictions generally, rather than the ten-year penalty applicable to drug recidivists like respondent. *Id.* at 12a, 16a. The court acknowledged, however, that its decision conflicted with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-470 (per curiam), cert. denied, 543 U.S. 967 (2004), and was in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (2006) (per curiam), and the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (2003). See App., *infra*, 16a-17a n.6.

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[2] Respondent appealed his conviction, arguing that the district court erred in denying his motion to suppress evidence and that the evidence was insufficient to support his conviction. The court of appeals affirmed the denial of respondent's motion to suppress and upheld his conviction. App., *infra*, 1a-2a, 5a-10a.

The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 29a-30a.

REASONS FOR GRANTING THE PETITION

In this case, the Ninth Circuit applied its settled rule that recidivist enhancements to prior offenses must be disregarded in determining the maximum sentence that could have been imposed on a recidivist offender. Accordingly, the court held that respondent's prior drug-trafficking convictions were not "offense[s] * * * for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2), even though the court acknowledged that respondent could lawfully have been sentenced to ten years of imprisonment for each of his prior offenses. The court's approach is incorrect; it has been rejected by two other courts of appeals and is in tension with the analysis of a third circuit; and it has recurring importance for the proper and uniform application of the ACCA. More broadly, a variety of provisions in federal criminal and immigration law turn on the maximum punishment that was available for a prior offense of which a person was convicted. The Ninth Circuit's incorrect approach to determining the maximum punishment understates the seriousness of those prior convictions in many cases, and thus precludes accurate classification of their current legal status. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's decision.

1. The court of appeals' decision rests on an incorrect understanding of the law and this Court's precedent.

a. There is no dispute in this case that Washington law rendered respondent eligible for a maximum sen-

tence of ten years of imprisonment based on his repeated controlled-substance convictions. See App., *infra*, 10a-11a. The Ninth Circuit nevertheless disregarded that fact in applying the ACCA solely because respondent's maximum sentence for his prior state offenses was increased by his recidivism. Nothing in the ACCA justified the court's determination of the "maximum term of imprisonment * * * prescribed by law" without consideration of applicable recidivist enhancements.

The ACCA treats a federal defendant's prior drug offense as "serious" if the offense carried a maximum term of imprisonment of at least ten years "prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). On its face, Washington law prescribed a maximum sentence of ten years for respondent's drug-trafficking crimes. See Wash. Rev. Code §§ 9A.20.021(1)(c), 69.50.401, 69.50.408 (1994). The ACCA does not require that the maximum sentence rest exclusively on the elements or "facts underlying the prior offense." App., *infra*, 11a-12a n.3. Because respondent was a recidivist drug offender, the enhanced maximum sentence set forth by Section 69.50.408—and not the base maximum ordinarily provided by Section 9A.20.021(1)(c)—"prescribes [the] punishment for [his] offense." *Corona-Sanchez*, 291 F.3d at 1218 (Rymer, J., concurring in part and dissenting in part, joined by Kozinski, Kleinfeld, and T.G. Nelson, JJ.). The ACCA refers to the real maximum "prescribed by law" for respondent's prior offenses—not to a hypothetical maximum prescribed for a first offender.

This Court has long recognized that a recidivist enhancement does not impose additional punishment for the prior crime. *Nichols* v. *United States*, 511 U.S. 738, 747 (1994). Rather, it is a "stiffened penalty for the lat-

est crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948). Like many other jurisdictions, Washington has imposed just such a "stiffened penalty" for recidivist drug offenders. *Id.* at 732. Read naturally, the ACCA's phrase, "maximum term of imprisonment," 18 U.S.C. 924(e)(2)(A)(i), refers to such enhanced penalties for recidivists, which are a common feature of the criminal justice system. See *Parke* v. *Raley*, 506 U.S. 20, 26-27 (1992) (noting that all 50 States and the Federal Government provide for recidivist enhancements).

In a comparable context, this Court has read statutory language referring to a "maximum" term to take into account recidivist enhancements. See *United States* v. *LaBonte*, 520 U.S. 751 (1997). In *Labonte*, the Court considered the meaning of the phrase "maximum term authorized" in 28 U.S.C. 994(h), which directed the United States Sentencing Commission to provide for sentences close to the maximum for certain recidivist offenders. *LaBonte*, 520 U.S. at 752-753. The Sentencing Commission promulgated a "Career Offender Guideline" to implement Section 994(h) that excluded any increases based on a defendant's prior convictions from the "maximum term authorized" for an offense. *Id.* at 754-755. This Court held that the Commission's action was inconsistent with the statute's text, reasoning that, "[w]here Congress has enacted a base penalty for first-time offenders or nonqualifying repeat offenders, and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offenders is the enhanced, not the base, term." *Id.* at 759. The same statutory analysis applies here. When Congress in the ACCA referred to the "maximum term of imprisonment," it meant the maximum term including

any recidivist enhancements for which an offender qualified, not to a base, unenhanced term.

b. In holding otherwise, the court of appeals misread this Court's precedent. The court relied principally (App., *infra*, 11a-12a; see *Corona-Sanchez*, 291 F.3d at 1208-1209) on this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990). In *Taylor*, this Court held that the term "burglary," which is a "violent felony" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), refers to the "generic sense in which the term is now used in the criminal codes of most States, *Taylor*, 495 U.S. at 598, which must be determined by a "categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions," *id.* at 600. The Ninth Circuit reasoned that the "maximum term of imprisonment" must likewise be defined "categorically," by looking to "the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Corona-Sanchez*, 291 F.3d at 1208-1209. That extension of *Taylor* was erroneous.

This Court has applied *Taylor* to determine whether the *elements* of a crime fit a categorical definition in a statutory scheme. For example, in *Taylor*, the Court construed "burglary" in the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), to mean a "generic" form of the crime, and this Court then instructed courts to decide whether a particular state statute proscribed generic burglary by looking at the statute's elements, rather than at the particular conduct in which the defendant engaged. *Taylor*, 495 U.S. at 598, 600, 602. The Court, however, did not suggest that the "maximum" *penalty* for a crime should be determined by ignoring the maximum penalty to which a defendant was exposed as a result of a recidivist

enhancement. All *Taylor* requires is that courts refrain from looking to the "facts underlying" convictions. *Id.* at 600.

The Ninth Circuit erred in this case by going further and directing courts to ignore state law itself. App., *infra*, 11a (district court "could consider only the five-year maximum penalty"). But "nothing in *Taylor* suggests that [a court] must" "separate the recidivist enhancement from the underlying offense" and ignore the sentence authorized by state law. *Corona-Sanchez*, 291 F.3d at 1217 (Rymer, J., concurring in part and dissenting in part, joined by Kozinski, Kleinfeld, and T.G. Nelson, JJ.). Consideration of a recidivist enhancement to a prior state offense does not require a federal sentencing court to delve into the defendant's past unadjudicated conduct. Rather, it requires consideration only of court documents that reveal how the defendant's prior criminal record affected the maximum punishment he faced. This does not create the "collateral trials" and "evidentiary disputes" that *Taylor* sought to forestall. *Shepard* v. *United States*, 544 U.S. 13, 23 & n.4 (2005) (permitting resort to judicial records in *Taylor* analysis to determine whether a plea-based conviction was for a generic crime).

Finally, the Ninth Circuit's analysis finds no support in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). In *Corona-Sanchez*, the Ninth Circuit relied on this Court's statement in *Apprendi* that "recidivism 'does not relate to the commission of the offense,'" *Apprendi*, 530 U.S. at 488 (quoting *Almendarez-Torres*, 523 U.S. at 244), and on the Court's holding in *Almendarez-Torres* that a recidivist enhancement "does not define a sepa-

rate crime." *Corona-Sanchez*, 291 F.3d at 1209 (citing *Almendarez-Torres*, 523 U.S. at 230, 239-247).

But those constitutional principles do not apply in the present context. *Almendarez-Torres* held that the fact of recidivism can be treated as a sentence enhancement, rather than as an element of an offense, and thus need not be charged in a federal indictment. *Apprendi* held that any fact other than recidivism that increases the otherwise-applicable maximum penalty is subject to the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment right to a jury trial. Those cases thus define procedural requirements that apply to facts other than prior convictions that raise a maximum sentence. They do not purport to define for statutory purposes under the ACCA what *is* the maximum sentence. The fact that, as a matter of constitutional law, recidivism need not be treated as an element of a separate crime does not detract from the reality that recidivists, like respondent, face a greater "maximum term of imprisonment," 18 U.S.C. 924(e)(2)(A)(i), than first offenders. Indeed, if anything, *Almendarez-Torres* makes clear that recidivism is an entirely permissible basis for a sentence enhancement even when it is *not* treated as an element of the crime. *Apprendi*, 530 U.S. at 488 (discussing *Almendarez-Torres*).[3]

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[3] Respondent has never contended in this case that the "maximum term of imprisonment" he faced under Washington law was defined by the upper end of the state sentencing guidelines range; rather, his sole contention was that recidivist enhancements could not be taken into account in determining the "maximum" penalty he faced. Accordingly, any such reliance on the guidelines maximum is waived.

In any event, ACCA's reference to the "maximum term of imprisonment * * * prescribed by law" should not be understood to refer to a

The Ninth Circuit's erroneous interpretation of this Court's precedent, which frustrates the federal interest

guidelines maximum that is lower than a statutory maximum. It is true that respondent's range under Washington's guidelines system was 43-57 months of imprisonment for each of his controlled-substance convictions in Washington. See C.A. Supp. E.R. 128-129, 147-148, 182-183. But the same judgments also state that the "[m]aximum [t]erm" he faced for each offense was ten years. *Ibid.* It does not matter that nearly a decade after entry of those judgments this Court held in *Blakely* v. *Washington*, 542 U.S. 296 (2004), that the "'statutory maximum' for *Apprendi* purposes" was the standard sentencing guidelines range, rather than the ten-year maximum authorized by statute for Blakely's felony. *Id.* at 303. *Blakely*'s use of the phrase "for *Apprendi* purposes," *ibid.*, made clear that the Court did not purport to establish the statutory maximum sentence for all purposes or for non-*Apprendi* purposes. *Blakely*, like *Apprendi*, speaks only to the *procedures* that must attend fact finding that raises a sentence above an otherwise-applicable maximum; it does not affect the statutorily established maximum term itself. And Congress, which enacted the pertinent language in the ACCA long before *Blakely* or *Apprendi*, see Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(b), 100 Stat. 3207-39, undoubtedly focused its attention on the maximum term that state statutes authorized for an offense under any circumstances (regardless of the procedures needed to find the relevant facts). The courts of appeals that have addressed the issue have thus concluded that, in determining whether a prior conviction is for a "crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. 922(g)(1), "the maximum sentence is the statutory maximum sentence for the offense, not the maximum sentence available in the particular case under the sentencing guidelines." *United States* v. *Murillo*, 422 F.3d 1152, 1154 (9th Cir. 2005) (rejecting the argument that *Blakely* affects the determination of the maximum potential sentence under 18 U.S.C. 922(g)(1)), cert. denied, 126 S. Ct. 1928 (2006); see *United States* v. *Harp*, 406 F.3d 242, 246-247 (4th Cir.) (*Apprendi* and *Blakely* pertain only to the "*process* by which the elements of [a] crime and other relevant facts must be determined," and do not prevent the defendant's prior drug crime from being punished by a prison term of more than one year) (quoting *United States* v. *McAllister*, 272 F.3d 228, 232 (4th Cir. 2001)), cert. denied, 126 S. Ct. 297 (2005).

in punishing recidivists who have proved to be a recurring threat to public safety, merits this Court's review.

2. The Ninth Circuit's holding that the ten-year maximum sentence authorized for each of respondent's prior convictions did not trigger the ACCA enhancement also conflicts with the decisions of other courts of appeals, as the Ninth Circuit itself acknowledged. See App., *infra*, 16a-17a n.6 ("We recognize that this conclusion is in conflict with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-70 (7th Cir. 2004), *cert. denied*, 543 U.S. 967, 125 S. Ct. 431, 160 L. Ed. 2d 336 (2004), and in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (5th Cir. 2006) (per curiam), and the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (4th Cir. 2003).").

In *Henton*, *supra*, the defendant, like respondent here, claimed that his prior state conviction for possessing with intent to deliver cocaine did not qualify as an ACCA predicate offense because the state statute generally provided that the offense was punishable by three to seven years of imprisonment. The Seventh Circuit rejected that argument because the statute separately provided, like Washington law here, that "any person convicted of a second or subsequent offense under this act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized." 374 F.3d at 469 (quoting Ill. Rev. Stat. ch. 56½, para. 1408(a) (1989)). The Seventh Circuit accordingly concluded that, "[b]ecause Henton was eligible for up to fourteen years' imprisonment, the district court properly concluded that the 1993 conviction qualifies as a 'serious drug offense' under ACCA." *Id.* at 470.

The Seventh Circuit recently reaffirmed its decision in *Henton*, explaining that:

> The [ACCA] inquires about the highest possible penalty. When Perkins continued selling cocaine despite his prior conviction, he exposed himself to a maximum of 14 years in prison. Federal law deems that a "serious" drug offense.

United States v. *Perkins*, 449 F.3d 794, 796 (7th Cir.), cert. denied, 127 S. Ct. 330 (2006). Thus, had respondent committed his federal offense within the Seventh Circuit, he would have received a minimum 15-year sentence under the ACCA, rather than the 92-month sentence imposed by the district court under *Corona-Sanchez*.

The Fifth Circuit likewise has expressly rejected the approach taken by the Ninth Circuit here. In *Mutascu*, *supra*, the Fifth Circuit held that a California conviction for petty theft constituted an aggravated felony "for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G), because Mutascu was sentenced under the petty theft statute's recidivist sentencing provision to one year in prison. 444 F.3d at 711-712. In so holding, the Fifth Circuit expressly disagreed with *Corona-Sanchez*. *Id.* at 712 (citing *United States* v. *Sanchez-Villalobos*, 412 F.3d 572, 577 n.3 (5th Cir. 2005) (also disagreeing with *Corona-Sanchez*), cert. denied, 126 S. Ct. 1142 (2006)). The Fifth Circuit specifically rejected the Ninth Circuit's attempt to "atomize[]" the theft sentence "into its predicate offense," while ignoring the alternative sentence authorized by statute and actually applied based on Mutascu's prior conviction. *Ibid.*

Finally, the Ninth Circuit's decision is in tension with the Fourth Circuit's analysis in *Williams*, *supra*. In *Williams*, the government argued that, by virtue of the defendant's first drug trafficking offense, his second offense (under New Jersey state law) subjected him to a sentence of up to ten years of imprisonment, and therefore qualified as an ACCA predicate offense. 326 F.3d at 538. The Fourth Circuit disagreed, but only because, under the relevant New Jersey law, Williams was not automatically eligible for the higher recidivist sentence. Eligibility for such a sentence depended upon the State's compliance with certain procedural protections with which the State had not complied. *Id.* at 538-539. The Fourth Circuit concluded that the ACCA does not "allow[] us to overlook a state's procedures in determining what constitutes a serious drug offense." *Id.* at 540.

The Fourth Circuit's reasoning strongly suggests that, where the fact of a prior conviction automatically subjects a defendant to an enhanced penalty or where the procedural steps necessary to trigger the enhanced penalty are satisfied, the "maximum term of imprisonment * * * prescribed by law" for the offense would include a recidivist sentence.

Because *Corona-Sanchez* is an en banc decision of the Ninth Circuit and because the Ninth Circuit denied the government's petition for rehearing en banc in this case, which called that court's attention to the inter-circuit conflict, Gov't Pet. for Reh'g 14-17, there is little prospect of the Ninth Circuit receding from its position and the circuit conflict being resolved without this Court's intervention.

3. The question of whether recidivist sentences for a prior offense may be considered in determining the

"maximum term of imprisonment prescribed by law" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), is a recurring and important question that merits an exercise of this Court's certiorari jurisdiction. The enhanced sentences prescribed by federal law for armed career criminals are an important law-enforcement tool in combating recidivist violent and drug-trafficking offenders, and, in the federal government's experience, the question whether a prior recidivist sentence triggers armed career criminal status arises with frequency.

Furthermore, as the *Corona-Sanchez* decision demonstrates, the same analytical question arises under the Sentencing Guidelines and immigration law. See 291 F.3d at 1203-1204; see also *Sanchez-Villalobos*, *supra* (Sentencing Guidelines); *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (immigration); *United States* v. *Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003) (Sentencing Guidelines); *United States* v. *Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002) (applying *Corona-Sanchez* in a Sentencing Guidelines case to the federal drug-possession statute, 21 U.S.C. 844), cert. denied, 538 U.S. 915 (2003).

The disparate enforcement of the ACCA in different federal circuits should be reconciled by this Court. Had respondent's case arisen within the Fifth or Seventh Circuit, his sentence would have been at least double the length that was imposed by the district court under *Corona-Sanchez*. Congress, by specifying lengthy minimum sentences for armed career offenders meeting certain criteria indicated a specific interest in ensuring that sentences for such offenders have a degree of uniformity. Such substantial inter-circuit disparity in federal sentences is hard to reconcile with that congressional

judgment and, in all events, merits this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-30397, 04-30494

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLEE

Argued and Submitted: Jan. 23, 2006
Filed: Oct. 5, 2006

Before: RAWLINSON and CLIFTON, Circuit Judges, and MARSHALL,* Senior District Judge.

RAWLINSON, Circuit Judge:

A jury convicted Gino Rodriquez of being a felon in possession of a firearm. On appeal, he argues that the district court erred in denying his motion to suppress

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* The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

the firearm because consent to search was not voluntary. He also contends that there was insufficient evidence to support his conviction. On cross-appeal, the government maintains that the district court erroneously concluded that Rodriquez's prior drug convictions do not qualify as predicate offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). We conclude that the search was conducted pursuant to a valid consent; there was sufficient evidence to support the jury's finding that Rodriquez possessed the firearm; and the district court—relying on *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) —correctly held that Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA. We therefore affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Gino Rodriquez has several felony convictions in Washington State, including three convictions for delivery of a controlled substance. Rodriquez served his time and, upon his release, was placed on a term of community supervision, from which he absconded. He was subsequently placed on "escape status," and four warrants were issued for his arrest. His whereabouts were unknown until April 2003, when law enforcement officers located and arrested him.

Rodriquez was staying with Tammi Putnam in apartment 36 of an apartment complex in Spokane, Washington. Rodriquez had a key to the apartment, had access to the entire apartment, had his belongings there, and

received mail there. Rodriquez and Tammi resided with Tammi's daughter and teenaged son, Zachary.

In March 2003, Zachary's friend, William Packer, spoke to Rodriquez about "getting rid" of a gun. Rodriquez told Packer that he could "get rid" of it. Packer brought the gun to the apartment for Rodriquez. Rodriquez looked at the gun, grabbed it with his shirt, pulled the gun out of the sleeve and replaced it. Rodriquez kept the gun, telling Packer that he would try to sell it. Zachary later observed Rodriquez in the apartment with the gun on a table. When Zachary asked about the gun, Rodriquez stated that he was "getting rid of it."

Meanwhile, a joint fugitive task force was looking for Rodriquez and conducting surveillance of Deanna Torgeson, whom the task force had learned was visiting Rodriquez on a regular basis. In April 2003, task force officers followed Torgeson to the apartment complex where Rodriquez resided. They observed Torgeson talking to Rodriquez right outside the rear, open door of apartment 36, while Rodriquez was eating a bowl of cereal.

Spokane County Sheriff Deputy Kris Thompson arrested Rodriquez pursuant to four outstanding warrants for his arrest. Deputy Thompson found a bag of heroin and approximately $900 dollars in cash when Rodriquez was searched. After Deputy Thompson administered the *Miranda* warnings, which Rodriquez waived, Rodriquez denied living in apartment 36. Rodriquez also made other statements that, according to Deputy Thompson, "didn't quite match up," including conflicting stories about how he arrived at the apartment.

At this point, Tammi arrived on the scene. When Deputy Thompson asked her whether she lived in apart-

ment 36 and whether she knew Rodriquez or Torgeson, she responded that she did not live in that apartment, she did not know Rodriquez or Torgeson, and she was at the complex to pick up her child. She then entered apartment 35.

After conversing with the resident of apartment 35, Deputy Thompson discovered that Tammi had not been forthright. He confronted Tammi with her earlier statements, which she confessed were false. He advised her that "it was a criminal offense to make a false or misleading statement to a public servant." During the course of their conversation, she seemed "nervous" and "upset." Deputy Thompson explained that Rodriquez had been arrested and told Tammi that a warrant could be obtained to search the apartment, in which case the apartment would be secured to ensure the integrity of its contents. Alternatively, she could consent to a search. Deputy Thompson informed Tammi that she had the right to refuse to consent and read to her a search consent card, which she reviewed, signed, and dated. Upon receiving her consent, the officers searched the apartment, where they discovered the gun underneath a couch.

Rodriquez was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He moved to suppress evidence seized during the search, asserting that Tammi's consent was not voluntary. The district court denied the motion, and Rodriquez was convicted by a jury.

Rodriquez also objected to the government's request that the judge enhance his sentence under the ACCA. He contended that his two prior burglary convictions and three prior drug convictions did not qualify as predi-

cate offenses under the ACCA. The district court concluded that Rodriquez's prior burglary convictions qualified as two predicate offenses; however, relying on *Corona-Sanchez,* the district court held that the ACCA enhancement did not apply because Rodriquez's prior drug convictions did not qualify as predicate offenses. This timely appeal and cross-appeal followed.

II

DISCUSSION

A. The Motion to Suppress Was Properly Denied Because Tammi Putnam Voluntarily Consented to the Search of Apartment 36

"We review de novo the district court's denial of a suppression motion. The district court's underlying factual finding that a person voluntarily consented to a search is reviewed for clear error." *United States* v. *Pang,* 362 F.3d 1187, 1191 (9th Cir. 2004) (citations omitted).

"It is well settled that a search conducted pursuant to a valid consent is constitutionally permissible." *United States* v. *Soriano,* 361 F.3d 494, 501 (9th Cir. 2004) (citation and internal quotation marks omitted). "Whether consent to search was voluntarily given is to be determined from the totality of all the circumstances. It is the government's burden to prove that the consent was freely and voluntarily given. On appeal, evidence regarding the question of consent must be viewed in the light most favorable to the fact-finder's decision." *Id.* (citations and internal quotation marks omitted).

"Our cases have identified five factors to be considered in determining the voluntariness of consent to a

search. They are: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that she had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained." *Id.* at 502 (citations and internal quotation marks omitted). "No one factor is determinative in the equation. It is not necessary to check off all five factors, but many of this court's decisions upholding consent as voluntary are supported by at least several of the factors. Nevertheless, these factors are only guideposts, not a mechanized formula to resolve the voluntariness inquiry." *Id.* (citations and internal quotation marks omitted).

Based on the totality of the circumstances and after considering the applicable factors, we conclude that Tammi voluntarily consented to the search. As to the first factor, the district court concluded, and Rodriquez conceded in his brief, that Tammi was not in custody when she consented to the search. Second, the court determined that there was no "indication that firearms were exhibited or drawn," a conclusion with which Rodriquez also agreed. Third, because Tammi was not in custody, "*Miranda* warnings were inapposite . . ." *Id.* at 504 (citation omitted). Fourth, the court found, and Rodriquez acknowledged, that Tammi knew she had the right to refuse consent. "Knowledge of the right to refuse consent is highly relevant in determining whether a consent is valid." *Id.* (alteration and citations omitted). Moreover, where, as here, "*the officers themselves* informed [Tammi] that she was free to withhold her consent," "the probability that their conduct could reasonably have appeared to her to be coercive" is "substantially lessened." *United States v. Mendenhall*, 446 U.S.

544, 559, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (emphasis added).

Fifth, Deputy Thompson told Tammi that, if she chose not to consent, he could apply for a search warrant and secure her apartment. A "statement indicating that a search warrant would likely be sought and the [apartment] secured could not have, by itself, rendered [Tammi's] consent involuntary as a matter of law." *United States v. Whitworth*, 856 F.2d 1268, 1279 (9th Cir. 1988) (citations omitted). Rather, application of this factor "hinges on whether [Tammi was] informed about the possibility of a search warrant in a threatening manner." *Soriano*, 361 F.3d at 504 (citations omitted). "Even assuming, however, that [Deputy Thompson's statements] were made in a threatening manner so as to imply the futility of withholding consent, when probable cause to justify a warrant exists, the weight of the fifth factor is significantly diminished." *Id.* at 504-05 (citations omitted).

Probable cause to justify a warrant existed in this case. "Probable cause exists when there is a fair probability or substantial chance of criminal activity. It is well-settled that the determination of probable cause is based upon the totality of the circumstances known to the officers at the time of the search." *Id.* at 505 (citations and internal quotation marks omitted).

Prior to the search, the officers knew the following: Rodriquez had absconded from his supervision, and there were four outstanding warrants for his arrest; he was found standing right outside an open door to an apartment eating a bowl of cereal; he denied residing at the apartment, but two people independently confirmed that he resided there; he provided an implausible expla-

nation for how he arrived at the apartment; he attempted to distance himself from the apartment; and he was in possession of "a considerable size chunk of heroin" and approximately $900 dollars in cash. This collection of facts implies a fair probability of criminal activity resulting in probable cause, thereby significantly diminishing the weight of the fifth factor. See *id.*

The voluntary consent analysis does not automatically end here, however, because the five factors articulated in *Soriano* are not exhaustive. *Id.* at 502. In addition to the five factors, "execution of a consent form is one factor that indicates that consent was voluntary." *United States v. Childs*, 944 F.2d 491, 496 (9th Cir. 1991) (alteration and citation omitted). In this case, Tammi executed a consent form, reinforcing the conclusion that she voluntarily consented.

In sum, the totality of the circumstances in this case leads us to conclude that the district court's finding that Tammi voluntarily consented to the search was not clearly erroneous. We therefore affirm the district court's denial of Rodriquez's motion to suppress.

B. There Was Sufficient Evidence to Support the Jury's Finding that Rodriquez Possessed the Firearm

"When reviewing convictions for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Sanders*, 421 F.3d 1044, 1049 (9th Cir. 2005) (emphasis in the original) (citation and internal quotation marks omitted).

The evidence in the record reflects that Packer asked Rodriquez whether Rodriquez could "get rid" of the gun for him. Rodriquez responded that he could. Packer brought the gun to Rodriquez, who looked at the gun and handled it. After telling Packer that he would try to sell it, Rodriquez kept the gun. Zachary later observed Rodriquez in the apartment with the gun on a table. When Zachary asked about the gun, Rodriquez stated that "he was getting rid of it."

The evidence also supports a reasonable inference that Rodriquez resided in the apartment in which the gun was discovered: officers observed Rodriquez standing outside an open door to the apartment eating a bowl of cereal; although he denied residing in the apartment, two people independently confirmed that he resided there; he had a key to the apartment; he had access to the entire apartment; he had belongings in the apartment; and officers found mail sent to Rodriquez at the apartment's address.[1]

We conclude that the evidence at trial, viewed in the light most favorable to the prosecution, could lead a rational trier of fact to find beyond a reasonable doubt that Rodriquez possessed the firearm. See *United States v. Garcia-Cruz*, 978 F.2d 537, 542 (9th Cir. 1992)

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[1] The fact that the gun was located under the couch "where numerous individuals had access and control" does not establish that Rodriquez did not have possession of it; the evidence still reasonably supports the inference that he did. Rodriquez provided an implausible explanation for how he arrived at the apartment, denied living in the apartment, and stated that "he didn't have any belongings in apartment # 36," all of which could lead a rational trier of fact to conclude beyond a reasonable doubt that he was attempting to distance himself from the apartment because he was aware that he had put the gun under the couch.

(holding that the defendant's sole admission that he had "the gun dropped off to [him] to pick up" was sufficient evidence of possession).

C. Corona-Sanchez Forecloses Use of Rodriquez's Prior Drug Convictions as Predicate Offenses Under the ACCA

We review *de novo* whether a prior conviction "may be used for purposes of enhancement under the ACCA . . ." *United States* v. *Phillips*, 149 F.3d 1026, 1031 (9th Cir. 1998).

Under the ACCA, a person who violates 18 U.S.C. § 922(g) and has three prior convictions for a "violent felony" or a "serious drug offense" is subject to a mandatory minimum sentence of fifteen years. 18 U.S.C. § 924(e)(1). One definition of a serious drug offense is "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which *a maximum term of imprisonment of ten years or more* is prescribed by law . . ." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

Rodriquez was previously convicted of three drug offenses in violation of Washington Revised Code § 69.50.401, the maximum penalty for which is five years' imprisonment. Wash. Rev. Code § 9A.20.021(1)(c). However, if a person is convicted of "a second or subsequent offense," the maximum penalty is ten years. Wash. Rev. Code § 69.50.408(1). The question, then, is whether the district court should consider the maximum penalty as provided in the five-year statute of conviction (which would *not* trigger the ACCA enhancement), or consider the maximum ten-year penalty resulting from

the recidivism provision (which *would* trigger the ACCA enhancement).[2] The district court correctly applied our decision in *Corona-Sanchez,* concluding that it could consider only the five-year maximum penalty provided in the statute of conviction.

In *Corona-Sanchez,* we considered a similar issue: whether a defendant's prior conviction for petty theft under California Penal Code § 484(a) qualified as an "aggravated felony." 291 F.3d at 1208. To qualify as an aggravated felony, the term of imprisonment for the theft offense had to be at least one year. *Id.* On the face of California Penal Code § 484(a), the maximum possible sentence was six months. *Id.* However, the defendant "actually received a two year sentence . . . due to the application of California Penal Code § 666, which provides a sentence enhancement for recidivists." *Id.*

In deciding *Corona-Sanchez,* we followed the "familiar analytical model constructed by the Supreme Court in *Taylor v. United States,* 495 U.S. 575, [600] [, 110 S. Ct. 2143, 109 L. Ed. 2d 607] (1990)." *Id.* at 1203. For federal sentencing enhancement purposes, when we consider the prison term imposed for a prior offense, "we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements."[3] *Id.* at 1209 (reiterating that the court

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[2] Neither party challenges the district court's determination that Rodriquez's two prior burglary convictions qualify as two predicate offenses under the ACCA. The only issue is whether Rodriquez's prior drug convictions qualify as predicate offenses.

[3] In general, federal courts apply this categorical approach to decide whether a defendant's prior conviction qualifies as a particular type of predicate offense (e.g., an "aggravated felony" or a "serious drug of-

must examine the crime itself, "rather than any sentencing enhancements"); *see also United States v. Moreno-Hernandez*, 419 F.3d 906, 910 (9th Cir. 2005) (stating that, in *Corona-Sanchez*, the court held that "the substantive offense is to be considered independently of any recidivist sentencing enhancement."), *cert. denied*, —U.S.—, 126 S. Ct. 636, 163 L. Ed. 2d 515 (2005). We observed that this conclusion "is consistent with the Supreme Court's historic separation of recidivism and substantive crimes. As the Court bluntly put it, 'recidivism does not relate to the commission of the offense.'" *Corona-Sanchez*, 291 F.3d at 1209 (citations omitted).

The rationale articulated in *Corona-Sanchez* applies equally in this case,[4] dictating the conclusion that the district court could consider only the maximum penalty as provided in the five-year statute of conviction, and not the maximum ten-year penalty resulting from the recidivism provision.

The government attempts to distinguish *Corona-Sanchez* on several bases, none of which are persuasive. The government first posits that, unlike *Co-*

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fense"), which, in turn, determines whether the defendant will receive an enhanced sentence. To decide whether a prior conviction counts as a particular type of predicate offense under the categorical approach, "federal courts do not examine the facts underlying the prior offense, *but look only to the fact of conviction and the statutory definition of the prior offense.*" *Corona-Sanchez*, 291 F.3d at 1203 (emphasis added) (citation and internal quotation marks omitted). In *Corona-Sanchez*, we concluded that the categorical approach required us to "separate the recidivist enhancement from the underlying offense" and "consider the sentence available for the crime itself . . ." *Id.* at 1209-10.

[4] "We apply the categorical approach in a variety of sentencing contexts." *United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006) (citation and internal quotation marks omitted).

rona-Sanchez, where the petty theft statute (Cal. Penal Code § 484) and the recidivism provision (Cal. Penal Code § 666) were "wholly separate," the statutes in this case "are both in the same article . . . and are codified in fairly close proximity . . ." However, this distinction is not convincing because, in *Corona-Sanchez*, we concluded that "we must separate the recidivist enhancement from the underlying offense." *Corona-Sanchez*, 291 F.3d at 1210. We "must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209. We observed that our conclusion is consistent with, and based on, the Supreme Court's historic separation of substantive crimes and recidivism, pertinent legislative history, and our own cases distinguishing between substantive offenses and recidivist sentencing enhancement statutes. *Id.* This rationale applies regardless of where the recidivist provision is located in the statutory framework. *Cf. United States v. Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002) (relying on *Corona-Sanchez* to disregard a sentencing enhancement located in the same section as the substantive offense).[5]

The government next argues that, in *Corona-Sanchez*, the issue was whether the defendant's prior conviction was for a "theft offense . . . for which the term of imprisonment is at least one year." *Corona-Sanchez*, 291 F.3d at 1204 (alteration, citation, and footnote reference omitted). The "theft offense" language, the government continues, suggests that Congress sought to include "only the punishment imposed for the theft of-

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[5] The government concedes that "the logic of *Corona-Sanchez* does not appear to be confined to separately codified sentencing schemes . . ."

fense itself." In contrast, according to the government, the issue in this case is whether Rodriquez's prior drug convictions were for "an offense . . . *involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . ." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). The government contends that the language defining drug offenses is "more expansive and encompasses recidivist offenses . . ."

The government's reliance on the "theft offense" characterization is misplaced, however, because *Corona-Sanchez* did not rely on or attach any particular significance to that term. Rather, *Corona-Sanchez* focused on *the term of imprisonment for the theft offense* in determining whether a conviction for theft qualified as an aggravated felony. *See* 291 F.3d at 1208.

By urging us to conclude that the term "involving" is so broad as to "encompass[ ] recidivist offenses," the government is, in effect, contending that the drug offenses should be interpreted as subsuming corollary recidivism enhancements. That interpretation would effectively render "offense" and "sentencing enhancements" coterminous, a result that is foreclosed by Supreme Court precedent. *See Apprendi v. New Jersey*, 530 U.S. 466, 488, 496, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("[R]ecidivism does not relate to the commission of the offense.") (internal quotation marks omitted); *see also Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) ("[S]entence enhancements . . . do not describe substantive criminal offenses . . .") (internal quotation marks omitted) (citing *Corona-Sanchez*, 291 F.3d at 1211); *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (per curiam) (holding that California Vehicle

Code § 23175 [now § 23550, which provides an enhanced penalty for successive convictions for driving under the influence of alcohol,] "is an enhancement statute; it does not alter the elements of the underlying offense.") (citation omitted).

Finally, the government postulates that *Corona-Sanchez* applies only where the underlying offense is a misdemeanor and applying the recidivism provision would transform the misdemeanor into a felony. Because Rodriquez's prior drug offenses are already felonies, the government maintains, *Corona-Sanchez* does not apply, and the district court should have considered the maximum penalty applying the recidivism provision.

We disagree. *Corona-Sanchez* applies irrespective of the nature of the underlying crime of which a defendant is convicted. In *Corona-Sanchez*, we held that "a crime may be classified as an 'aggravated felony' . . . without regard to whether, under state law, the crime is *labeled* a felony or a misdemeanor." 291 F.3d at 1210 (emphasis in the original). In so holding, we agreed with our sister circuits that "it is irrelevant whether the state labels the underlying crime 'misdemeanor' or 'felony'. . . . The relevant question is whether the crime meets the definition of an 'aggravated felony' under federal sentencing law." *Id.* (citation and footnote reference omitted).

Likewise, Rodriquez's three convictions for delivery of a controlled substance may be classified as "serious drug offenses" "without regard to whether, under state law, the crime is *labeled* a felony or a misdemeanor." *Id.* As articulated in *Corona-Sanchez*, "it is irrelevant" whether Rodriquez's underlying crimes are misdemeanors or felonies; the relevant question is whether his

prior drug offenses meet the definition of a "serious drug offense." *Id.* Under *Corona-Sanchez*, whether application of a recidivism enhancement would transform a misdemeanor into a felony is simply of no import.

However the government frames its argument, the essence of its request is that we consider the offense and the sentencing enhancement together. But that is precisely what is forbidden by *Corona-Sanchez* and its progeny. *See Moreno-Hernandez*, 419 F.3d at 911 ("*Corona-Sanchez* explained the cleaving of the recidivist enhancement from the underlying offense largely on the basis that the enhancement was measured by recidivism. Following the Supreme Court's reiteration . . . that 'recidivism does not relate to the commission of the offense,' the en banc court regarded petty theft as a single, substantive offense, as to which various sentencing alternatives were available depending on the defendant's past criminal history.") (citations and emphasis omitted).

In sum, the government's distinctions cannot overcome the language in, or the rationale of, *Corona-Sanchez*. Based on *Corona-Sanchez*, the district court properly concluded that it could consider only the five-year maximum penalty provided in the statute of conviction. Because Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA, the district court correctly declined to apply that enhancement.[6]

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[6] We recognize that this conclusion is in conflict with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-70 (7th Cir. 2004), *cert. denied*, 543 U.S. 967, 125 S. Ct. 431, 160 L. Ed. 2d 336 (2004), and in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (5th Cir. 2006) (per curiam), and the Fourth

III

CONCLUSION

Because Tammi Putnam voluntarily consented to the search of apartment 36, the motion to suppress the firearm was properly denied. There was sufficient evidence presented during trial to enable a rational jury to conclude beyond a reasonable doubt that Rodriquez possessed the firearm. *Corona-Sanchez* applies in this ACCA case, dictating the conclusion that Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA.

AFFIRMED

Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (4th Cir. 2003). Nevertheless, *Corona-Sanchez* is binding Ninth Circuit precedent and dictates the conclusion we reach.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CR-03-142-RHW

UNITED STATES OF AMERICA, PLAINTIFF

v.

GINO G. RODRIQUEZ, DEFENDANT

[Filed Sept. 03, 2004]

SENTENCING ORDER

A sentencing hearing was held on September 2, 2004, in Spokane, Washington. Defendant was convicted by jury trial to one Count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). Defendant objects to being classified as an Armed Career Criminal, arguing that his two prior California Convictions for Residential Burglary do not qualify as predicate offenses, nor do his three Spokane County drug convictions. This order memorializes the Court's oral ruling.

DISCUSSION

The Armed Career Criminal enhancement is found in both the United States Criminal Code and the United States Sentencing Guidelines. The statute provides that a person who violates § 922(g) (felon in possession of a firearm) and has three previous convictions for a violent felony or serious drug offense, committed on occasions

different from one another, shall receive a minimum 15-year sentence. 18 U.S.C. § 924(e)(1). "Serious drug offense" is defined as: (i) a federal offense under the Controlled Substance Act for which a maximum term of imprisonment of 10 years or more is prescribed by law; or (ii) a state offense involving the manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance for which a maximum term of imprisonment of 10 years or more is prescribed by law. 18 U.S.C. § 924(e)(2)(A). A "violent felony means any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Under 4B1.4 of the United States Sentencing Guidelines, a defendant who meets the criteria of 18 U.S.C. § 924(e) is considered an Armed Career Criminal. U.S. Sentencing Guidelines Manual § 4B1.4 (2003).

In determining whether a particular prior offense qualifies as a predicate offense for the Armed Career Criminal enhancement, the court engages in a categorical analysis, in that the court does not examine the facts underlying the prior offense, but "looks only to the statutory definitions of the prior offenses." *Taylor v. United States*, 495 U.S. 575, 600 (1990); *United States v. Wofford*, 122 F.3d 787, 792 (9th Cir. 1997). If the statute criminalizes conduct that would not constitute a "violent felony," the conviction may not be used for sentence enhancement, unless the record includes "documentation or judicially noticeable facts that clearly establish that

the conviction is a predicate conviction for enhancement purposes." *United States v. Potter*, 895 F.2d 1231, 1237 (9th Cir. 1990).

In *Taylor*, the Supreme Court held that the definition of burglary, as used in § 924(e), contains at least the following elements: (1) an unlawful or unprivileged entry into, or remaining in, a building or other structure, (2) with intent to commit a crime. 495 U.S. at 599. Thus, for purposes of a § 924(e) enhancement, if a person has been convicted of burglary, where the statutory definition of burglary includes the basic elements of unlawful or unprivileged entry into or remaining in, a building or structure, with intent to commit a crime, that conviction will qualify as a predicate offense in determining whether a person is an Armed Career Criminal for sentencing purposes.

A. California Convictions

In 1980 and 1982, Defendant was convicted of Residential Burglary in the Superior Court of Kings County, California. Although § 459 of the California Penal Code has been amended since 1980 and 1982, the basic definition of burglary has not changed. Section 459 provides that:

> Every person who enters any house, room, apartment . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Pen. Code § 459 (2004).

Courts interpreting § 459 of the California Penal Code have held that this statute does not qualify as a "violent felony" under the strict categorical approach

approved in *Taylor*. *United States v. Parker*, 5 F.3d 1322, 1324 (9th Cir. 1993). These courts then engaged in a "modified categorical" approach in which the courts looked at other documents and judicially-noticeable facts to determine whether the offense was within the Guidelines' definition. *Id.*; see also *United States v. Shumate*, 329 F.3d 1026, 1029 (9th Cir. 2003). If the statute, together with other documents and the judicially-noticeable facts, demonstrates that the defendants could have been "convicted of an offense other than that defined as a qualifying offense," the offense cannot be used to enhance defendant's sentence. *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004).

1. Defendant's 1980 California Conviction

The Government provided certified copies of documents relating to Defendant's 1980 conviction (Ct. Rec. 70, Attach. D), including the 1980 Amended Information and copies of the abstract of Defendant's arraignment, the State's motion to file the amended Information, Defendant's plea to the charged burglary, and the Commitment and Sentence.

The Amended Information charges in Count 1 that Defendant "did willfully, unlawfully and feloniously, in the nighttime, enter the inhabited dwelling house of Ernest Filippi located at 1504 Middleton, Hanford, with intent to commit theft." Defendant pleaded guilty to Count 1 as charged in the Amended Information. In doing so, Defendant pleaded guilty to unlawfully entering a dwelling house with intent to commit theft, which are the elements that make up the generic definition of burglary. The documents do not demonstrate that De-

fendant could have been convicted of an offense other than that defined as a qualifying offense. As such, Defendant's 1980 Calilfornia conviction qualifies as a predicate offense.

2. Defendant's 1982 California Conviction

The Government provided certified copies of documents relating to Defendant's 1982 conviction (Ct. Rec. 70, Attach. E), including the 1982 information and copies of the abstract of Defendant's bail reduction motion, Defendant's plea to the charged burglary, the Probation Office's Recommendation for an Aggravated Sentence, and the abstract of the Judgment imposed.

The Information charges in Count 1 that Defendant "did willfully, unlawfully and feloniously, enter the inhabited dwelling house of M.W. Wolfe, located at 1209 N. Ridengton, Hanford, with intent to commit theft." Defendant pleaded guilty to Count 1. Although the guilty plea did not specifically refer to the Information, it is implicit in the documents that Defendant was pleading to the charge contained in Count 1 of the Information. In doing so, Defendant pleaded guilty to unlawfully entering a dwelling house with intent to commit theft, which, like the 1980 conviction, are the elements that make up the generic definition of burglary. The documents do not demonstrate that Defendant could have been convicted of an offense other than that defined as a qualifying offense. As such, Defendant's 1982 California conviction qualifies as a predicate offense.

The Court finds that the 1980 and 1982 convictions qualify as predicate offenses for purposes of determining whether Defendant is an Armed Career Criminal.

B. Spokane County Convictions

On November 16, 1995, Defendant was convicted under three separate causes of actions for drug offenses that were related to a series of drug transactions that took place in March of 1994, and between October 1994 and January 1995. In each case, Defendant pleaded guilty to violating Wash. Rev. Code § 69.50.401. The maximum penalty for a violation of § 69.50.401 is five years. Under Washington law, however, if a person is convicted of "a second or subsequent offense" relating to narcotic drugs, the maximum penalty is 10 years. Wash. Rev. Code § 69.50.408.[1] This is referred to as the "doubling statute."

The question then is whether, when applying 18 U.S.C. § 924(e), the Court should consider the maximum penalty as provided in the statute of conviction, or consider the maximum penalty that is a result of a sentencing enhancement or doubling statute. In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002), the Ninth Circuit, using the *Taylor* categorical approach, [2]

---

[1] "(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

"(2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs." Wash. Rev. Code § 69.50.408 (2003).

[2] The Ninth Circuit has applied *Taylor's* categorical approach in a variety of sentencing contexts. *See, e.g., United States v. Martinez*, 232 F.3d 728-33 (9th Cir. 2000) (career offender status pursuant to U.S.S.G. § 4B1.1); *United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172 (9th Cir.

addressed a similar issue in determining whether a California conviction for petty theft constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *Id.* In that case, the defendant's conviction of petty theft carried a maximum penalty of six months.[3] *Id.* at 1207. Under the Sentencing Guidelines, a defendant's prior conviction for petty theft would qualify as an aggravated felony if the term of imprisonment was at least one year. 8 U.S.C. § U.S.C. 1101(a)(43)(G). The defendant, however, received a two-year sentence, due to the application of California Penal Code § 666, which sets forth a sentence enhancement for recidivists.[4] *Id.* In applying the *Taylor* categorical approach, the Circuit separated the recidivist enhancement from the underlying offense, and only considered the maximum possible sentence for the offense of conviction. *Id.* at 1210 ("*Taylor* required us to examine the prior crimes by considering the statutory definition of the crimes categorically, without refer-

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2000) (aggravated felony pursuant to U.S.S.G. § 2L1.2(b)(1)(A)); *United States v. Sandoval-Barajas*, 206 F.3d 853, 855-56 (9th Cir. 2000) (same); *United States v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999) (career offender status pursuant to U.S.S.G. § 4B1.1); *United States v. Bonat*, 106 F.3d 1472, 1475 (9th Cir. 1997) (predicate offense under the Armed Career Criminal Act).

[3] Although it was not clear in the presentence report, the Circuit concluded that the defendant was convicted of violating California Penal Code § 484(a), which is the general California theft statute. *Id.* at 1206.

[4] Section 666 provides: "Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison."

ence 'to the particular facts underlying those convictions.'") (citations omitted) The Circuit concluded that, on its face, the statute defining the crime of petty theft did not qualify as an aggravated felony under the federal sentencing law. *Id.* at 1211. In rejecting the Government's argument that the defendant's conviction for petty theft qualified as an aggravated felony, the Circuit stated that "under the categorical approach, we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209.

The Court does not see any distinction between the application of § 666 of the California Penal Code to a violation of § 484(a) and the application of Wash. Rev. Code § 69.50.408 to a violation of §69.50.401. In both cases, the application of the separate sentencing statute[5]

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[5] The Court notes that, in an unpublished opinion with a somewhat similar scenario, the Circuit reached a different result. See *United States v. Perez*, 2002 WL 31808370 (9th Cir. Dec. 11, 2002). In that case, the Circuit concluded that because the statutory scheme mandated a sentence in excess of one year for a repeat vehicle theft offender, the prior conviction for a theft offense qualified as an aggravated felony. *Id.* at *1. There, however, the crime of conviction, California Penal Code § 10851, fit within the "generic sense in which the term [theft offense] is now used in a criminal code of most States." *Id.* In addition, § 10851 provided for a penalty enhancement for repeat offenders, which increased the maximum penalty beyond the required year. *Id.* Contrast that case to the present case, as well as to another unpublished opinion where the sentencing enhancements are found in separate sections of the criminal code and are not referenced by the statute of conviction. See *Contreras-Castillo v. Ashcroft*, 2003 WL 21153490 (9th Cir. May 16, 2003). In *Contreras-Castillo*, the Circuit reiterated its rule established in *Corona-Sanchez* that only the statute of conviction should be considered without reference to other provisions that enhance the permissible and imposed sentence. *Id.* at *1.

does not alter the maximum sentence available for the crime itself. In this case § 69.50.401 does not qualify as a predicate offense because the maximum term of imprisonment for violation of this statute does not meet the statutory definition of a predicate offense, as defined in the United States Code. 18 U.S.C. § 924(e) states that a "serious drug offense" is one that involves the manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance, for which a maximum term of imprisonment of ten years or more is prescribed by law.

Here, § 69.50.401 states that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, and sets the maximum term of imprisonment at five years. Wash. Rev. Code § 69.50.401. Thus, on its face, the statutory definition of Defendant's prior drug offenses do [*sic*] not meet the criteria for a predicate offense for purposes of the armed career criminal enhancement. Accordingly, under *Corona-Sanchez*, the Court need look no further. See *Corona-Sanchez*, 291 F.3d at 1213 ("[E]ven if the relevant documents were to establish the substantive elements of the generic crime, the offense of which [defendant] was convicted would still not constitute an aggravated felony because it fails to meet the one-year sentence requirement of § 1101(a)(43)(G).").

The Government argues that § 69.50.408 is neither discretionary nor a sentence enhancement but, rather, is a provision that automatically doubles the statutory maximum sentence for convictions under § 69.50 when the defendant has a second or subsequent conviction under that statute. Even if the Government does not want to call § 69.50.408 a sentencing enhancement, it

clearly is meant to address the issue of recidivism. As the Supreme Court clearly stated, "recidivism does not relate to the commission of the offense." *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 230, 239-47 (1998) (concluding that a penalty provision that authorizes a court to increase the sentence for a recidivist does not define a separate crime). The Government's labeling of the statute as non-discretionary and not a sentencing enhancement does not affect the analysis. Indeed, in *Corona-Sanchez*, § 666 of the California Penal Code could arguably be categorized as a non-discretionary sentencing statute. Even so, the Circuit declined to consider this section when determining whether a predicate offense qualified as an aggravated felony.

In sum, Defendant's two prior California convictions for residential burglary do qualify as predicate offenses under the Armed Career Criminal enhancement. In order for the enhancement to apply, however, Defendant must be convicted of three qualifying predicate offenses. Because the Washington convictions do not meet the statutory definition of a predicate offense, the Armed Career Criminal enhancement should not be applied in this instance.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel and U.S. Probation.

DATED this 3 day of September 2004.

/s/ ILLEGIBLE
ROBERT H. WHALEY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-30397
D.C. No. CR-03-00142-RHW
Eastern District of Washington, Spokane

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLANT

No. 04-30494
D.C. No. CR-03-00142-RHW
Eastern District of Washington, Spokane

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLEE

[Filed: Jan. 12, 2007]

ORDER

Before: RAWLINSON and CLIFTON, Circuit Judges, and MARSHALL,* Chief District Judge.

The panel has voted to deny the petition for rehearing en banc.

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* The Honorable Consuelo Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for rehearing en banc filed on November 20, 2006, is DENIED.

APPENDIX D

STATUTORY PROVISIONS

1. Section 924(e) of Title 18 of the United States Code (2000 & Supp. IV 2004), provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which

a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

2. Section 69.50.401 of the Revised Code of Washington (1994) provides:

Prohibited acts: A—Penalties

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this section with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars, for each gram in excess of two kilograms, or both such imprisonment and fine;

(ii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iii) a substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not

more than five years, fined not more than ten thousand dollars, or both;

(b) Except as authorized by this chapter, it is unlawful for any person to create, deliver, or possess a counterfeit substance.

(1) Any person who violates this subsection with respect to:

(i) a counterfeit substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(ii) any other counterfeit substance classified in Schedule, I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iii) a counterfeit substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a counterfeit substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(c) It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other

liquid, substance or material in lieu of such controlled substance. Any person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(d) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

(e) Except as provided for in subsection (a)(1)(ii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.

(f) It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. A violation of this subsection shall be punished as a class C felony punishable in accordance with RCW 9A.20.021.

3. Section 69.50.408 of the Revised Code of Washington (1994) provides:

Second or subsequent offenses

(a) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(c) This section does not apply to offenses under RCW 69.50.401(d).

(2)

No. 06-1646

FILED
AUG 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GINO GONZAGA RODRIQUEZ

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) ("ACCA"), establishes a mandatory minimum sentence for a felon convicted of possession of a firearm if the defendant has three prior convictions for "serious drug offenses" or "violent felonies." A "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii). The question presented is:

Whether a court determining if a state conviction qualifies as a "serious drug offense" should look to the maximum term of imprisonment prescribed generally for the state offense, or must consider, in addition, particular facts of the case that could lead to an enhanced sentence under a broadly-applicable state recividist statute?

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STATEMENT

Respondent Gino Gonzaga Rodriquez was convicted as a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), a defendant who violates Section 922(g) is subject to a mandatory 15-year sentence if he or she has three previous convictions for a violent felony or a serious drug offense. Section 924(e)(2)(A)(ii) defines a "serious drug offense," in part, as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law."

The government sought to invoke this sentencing enhancement on the basis of respondent's conviction under Washington law for delivery of a controlled substance, an offense for which Washington law generally prescribes a maximum sentence of *five* years. It contended that the conviction qualifies as a "serious drug offense" because Washington's recidivist enhancement statute—which was *not* applied to enhance the sentence imposed upon respondent for this conviction—must be considered in determining whether the "offense" is one "for which a maximum term of imprisonment of ten years or more" is prescribed by state law. Both courts below squarely rejected this argument, holding that this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990), requires that the maximum term of imprisonment for the "offense" be determined on a "categorical" basis not tied to the particular facts of the case.

Contrary to the government's assertion, there is no conflict among the lower courts warranting this Court's attention. The government claims that the Seventh Circuit reached a conclusion contrary to the court below with respect to Section 924(e), but the Seventh Circuit was addressing a

different question regarding the applicability of Section 924(e), and the statement relied upon by the government was not necessary to the Seventh Circuit's decision. The Fourth Circuit decision invoked by the government expressly addresses only the same unrelated issue as the Seventh Circuit decisions. The government's reliance on the Fifth Circuit decision is wholly misplaced because it construed another federal statute with language very different from Section 924(e). Moreover, we have located only a single additional lower court decision—a district court ruling—addressing the issue presented by the petition. As Justice Frankfurter wrote over fifty years ago, it is "desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show, Inc*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari). Review by this Court is not warranted.

1. Respondent pleaded guilty in 1995 to three offenses under Washington law relating to drug transactions. One of these offenses was a violation of Wash. Rev. Code § 69.50.401(a)(1)(ii)-(iv), each of which states that a person who violates the provision "may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both." See Pet. App. 33a.

Washington law contains a separate provision empowering courts to impose enhanced sentences for individuals convicted of multiple drug violations. Termed a "doubling statute," the measure states that upon conviction of "a second or subsequent offense," a defendant "may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both." Wash. Rev. Code § 69.50.408(a).

The relevant state sentencing guidelines in 1995 provided that the permissible sentencing range for respondent's offense was 43-57 months. See C.A. Supp. E.R.

128-29, 147-48, 182-83. Although the maximum potential sentence for any recidivist was ten years, the maximum possible sentence for respondent under state sentencing guidelines was 57 months. Respondent was sentenced to 48 months on this conviction. *State* v. *Rodriquez*, No. 95-1-01071-8, Judgment & Sentence (Wash. Super. Ct. Nov. 21, 1995).

2. Before the district court in the present case, the government argued that respondent's 1995 conviction qualified as a "serious drug offense" under Section 924(e) because the five-year term of imprisonment prescribed generally for the offense by Wash. Rev. Code § 69.50.401, combined with the doubling statute, produced a maximum possible term of imprisonment of ten years.

The district court rejected the government's contention. Pet. App. 18a-28a. "In determining whether a particular offense qualifies as a predicate offense for the [ACCA] enhancement," the district court ruled, "the court engages in a categorical analysis, in that the court does not examine the facts underlying the prior offense, but 'looks only to the statutory definitions of the prior offenses.'" *Id.* at 19a (quoting *Taylor*, 495 U.S. at 600).

The court concluded that "on its face," Washington's "statutory definition of [respondent's] prior drug offenses do[es] not meet the criteria for a predicate offense for purposes of the armed career criminal enhancement" because it prescribes a maximum prison term of five years. Pet. App. 26a. It reasoned that the "separate" recidivist statute authorizing an optional sentencing enhancement did not "alter the maximum sentence available for the crime itself" (*id.* at 25a-26a), pointing to this Court's statement that "'recidivism does not relate to the commission of the offense.'" *Id.* at 27a (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 488 (2000)). Because respondent's conviction under Washington law did not qualify as a "serious drug

offense," the court concluded that the ACCA's automatic sentencing enhancement should not apply in this case.

3. The court of appeals unanimously affirmed. Pet. App. 1a-17a. Invoking "the 'familiar analytical model constructed by the Supreme Court in *Taylor*,'" the court of appeals held that "[f]or federal sentencing enhancement purposes, when we consider the prison term imposed for a prior offense, 'we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.'" *Id.* at 11a (quoting *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002)). The court observed that "the essence of [the government's request] is that we consider the offense and the sentencing enhancement together" (Pet. App. 16a), and squarely rejected that contention based on "the Supreme Court's historic separation of substantive crimes and recidivism, pertinent legislative history, and our own cases distinguishing between substantive offenses and recidivist sentencing enhancement statutes." *Id.* at 13a.

The court of appeals denied the government's petition for rehearing en banc, with no judge requesting a vote. Pet. App. 29a-30a.

ARGUMENT

The question presented regarding the meaning of Section 924(e)'s reference to "an offense * * * for which a maximum term of imprisonment of ten years or more is prescribed by law" has received scant attention from courts of appeals and district courts. The Ninth Circuit is the only court to have addressed the question in a case in which it was both briefed and essential to the court's holding. The other appellate decisions cited by the government involve cases in which the issue was not briefed and the court's statement was dicta; in which the court was interpreting a different sentencing enhancement statute with very different language; or in which the court was addressing a different question regarding

the scope of Section 924(e). Moreover, the government does not provide any evidence that the issue presented regarding Section 924(e) is creating confusion in the lower courts. Indeed, we have identified only a single additional district court decision addressing the question. Given the absence of a clear conflict among the lower courts and the lack of any indication of a pressing need for the Court to address the issue at this time, we submit that the proper course is to allow further consideration of the issue by the courts of appeals. In that way, if and when this Court decides to address the question, its decision will be aided by informed lower court opinions analyzing the issue. Review by this Court now simply is not warranted.

Moreover, the court of appeals' decision accords with this Court's precedent. The court below followed the approach of *Taylor*, *supra*, applying a "categorical" approach in determining whether an "offense" qualifies as an ACCA predicate. Because a recidivism enhancement is separate from the underlying substantive definition of the offense (see *Apprendi*, 530 U.S. at 488), the court below correctly considered only the sentence prescribed generally for the underlying offense, and not the sentence permissible based on the particular facts of this case.

A. There Is No Conflict Among The Courts Of Appeals With Respect To The Meaning Of Section 924(e) That Warrants This Court's Attention.

The government asserts that the decision here "conflicts" with rulings by the Seventh Circuit and is "in tension with" rulings by the Fifth and Fourth Circuits (Pet. 14). In fact, the Seventh Circuit's statement was dicta in cases in which the issue was not briefed. And the other courts' decisions, which the government acknowledges do not give rise to a conflict, do not even create tension: one involves a different statute and the other expressly addresses an entirely different

question regarding the scope of Section 924(e). There is no conflict necessitating review by this Court.

1. In *United States* v. *Henton*, 374 F.3d 467 (7th Cir.) (per curiam), cert. denied, 543 U.S. 967 (2004), the defendant had been convicted of possession of cocaine with intent to deliver, an offense that carried a maximum term of seven years under state law. Because enhancement under a separate recidivist statute could have produced a maximum term of fourteen years, the government argued that the offense qualified as a "serious drug offense" under the ACCA.

The defendant in *Henton* did not advance the argument, adopted by the court of appeals here, that enhancement due to recidivist statutes is irrelevant in determining the maximum term for "an offense" under Section 924(e). Rather, he asserted the very different contention that his prior conviction for possession with intent to deliver cocaine did not qualify as an ACCA predicate offense *because the prosecutor in the prior state action did not seek a recidivist enhancement in the indictment*. *Henton*, 374 F.3d at 468; Br. of Def. App. David L. Henton, No. 03-3657 at 9-11 (7th Cir. filed Dec. 16, 2003), *available at* http://www.law.yale.edu/documents/pdf/Clinics/henton.pdf. The defendant claimed that the prosecutor's failure to seek enhancement deprived him of required "due notice" that his actual exposure to imprisonment was fourteen years. Without such notice, the defendant argued, the state conviction could not qualify as an ACCA predicate offense. *Henton*, 374 F.3d at 468.

That is how the Seventh Circuit understood the defendant's argument: "Henton argues that the state's failure to expressly invoke the extended-term provision of the statute meant that he was not subject to it * * *." *Henton*, 374 F.3d at 469. The court rejected this argument because "the [state] statute does not contain any prerequisites, other than recidivism, to qualify for the extended term." *Ibid.*

The defendant in *Henton*, therefore, did not raise—and the Seventh Circuit consequently did not consider—the issue decided by the court below: whether a separate recidivist enhancement *ever* may be considered in determining the maximum term of imprisonment for "an offense" under Section 924(e). Because the defendant in *Henton* did not make this argument, the Seventh Circuit's broad statement that his eligibility "for up to fourteen years' imprisonment" qualifies the conviction as a "serious drug offense" simply cannot be read as a rejection of the argument adopted by the court below: the Seventh Circuit has not had an opportunity to consider that question. At most, it is dicta in *Henton* that is in tension with the decision below.

United States v. *Perkins*, 449 F.3d 794 (7th Cir.), cert. denied, 127 S. Ct. 330 (2006), involved the same issue as *Henton*. The defendant pointed to an Illinois statute "requiring judges to inform people who are pleading guilty about extra penalties for recidivism" (*id.* at 796), arguing that the state court's failure to inform him about the Illinois recidivist statute barred consideration of that statute in the federal proceeding. Like *Henton*, *Perkins* did not raise the issue reached by the court below. Br. of Def. App. Alonzo Perkins, No. 05-3163 (7th Cir. filed Jan. 26, 2006), *available at* http://www.law.yale.edu/documents/pdf/Clinics/perkins.pdf.

Because the Seventh Circuit was not faced with and hence did not decide the question presented here, the Seventh Circuit would not view itself as bound by any language in *Perkins* and *Henton* relating to that issue. See, *e.g.*, *Walker* v. *Abbott Lab.*, 340 F.3d 471, 476 (7th Cir. 2003) (declining to follow previous resolution of statutory interpretation issue when that issue was not squarely before the court and "since our decision * * * every circuit court to address the issue, five in all, have held" that the issue should be resolved differently); *United States* v. *Doherty*, 969 F.2d 425, 428 (7th Cir. 1992) (noting that "language in passing does not

establish the law of the Circuit" and declining to follow previously endorsed statutory reading that had since been rejected by courts of appeals that had "expressly addressed" same issue). Should the Seventh Circuit be presented with the argument advanced in this case, it may well find the analysis of the Ninth Circuit persuasive.[1] No genuine conflict having ripened between these Circuits, there is none for this Court to resolve.

2. Citing the per curiam opinion *Mutascu* v. *Gonzales*, 444 F.3d 710 (5th Cir. 2006), the government claims (Pet. 15) that the Fifth Circuit rejected "the approach" of the court below. That is simply wrong.

Mutascu was an immigration case in which the Fifth Circuit interpreted 8 U.S.C. § 1101(a)(43)(G), a portion of the statutory definition of "aggravated felony" providing that "aggravated felony" includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." Significantly, the statute further states that "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law * * *." *Id.* § 1101(a)(48)(B). Because the individual *actually had been sentenced* to a term of one year in prison, based in part on the applicable recidivist statute, the court of appeals concluded that the

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[1] Certainly the reasoning in *Henton* and *Perkins* does not require the Seventh Circuit to reject the Ninth Circuit's determination regarding the different question presented here. Those rulings focused narrowly on whether failure to comply with state procedural safeguards is relevant to whether prior state convictions may serve as predicate offenses under the ACCA. They did not address whether a court determining whether an offense is a "serious drug offense" should look only to the statutory maximum for the offense, rather than to sentencing enhancements that turn upon the particular facts of the case.

offense satisfied the "aggravated felony" definition. Indeed, the Fifth Circuit squarely rested its decision on this statutory language: "The statute states in 8 U.S.C. § 1101(a)(48)(B) that the term of imprisonment in (a)(43)(G) is at least the term 'ordered by a court of law.'" *Mutascu*, 444 F.3d at 712.

This dramatically different statutory text makes *Mutascu* irrelevant in interpreting Section 924(e), which includes no provision defining "term of imprisonment" to include the sentence actually pronounced by the court in the particular case. See 18 U.S.C. § 924(e)(2)(A)(i) (defining a "serious drug offense" under state law as a drug offense for which "a maximum term of imprisonment of ten years or more is prescribed by law"). This material difference between Section 924(e) of the ACCA and the relevant provisions of the immigration statute demonstrate that *Mutascu* does not conflict with the opinion below.[2]

3. Finally, the government argues that *United States* v. *Williams*, 326 F.3d 535 (4th Cir. 2003), is in "tension" with the result here. Pet. 16. The Fourth Circuit, however, addressed only the procedural question decided by the Seventh Circuit in *Henton*: whether the prosecutor's failure to seek a recidivist enhancement at the time of the underlying conviction—and thus to comply with the procedural requirements specified in the recidivist statute—precludes a finding that the offense was one for which the maximum term of imprisonment was ten years, even though the

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[2] The Fifth Circuit responded to the defendant's invocation of *Corona-Sanchez* by noting that it "*previously* disagreed with *Corona-Sanchez*" in another case involving interpretation of neither the immigration provision at issue in *Mutascu* nor Section 924(e). *Mutascu*, 444 F.3d at 712 (emphasis added). But the decision in *Mutascu* rests squarely on the particular language used by Congress in the immigration law—language not present in Section 924(e).

defendant was eligible for enhancement that *could have* produced a sentence of ten years.

Reaching a different result from the Seventh Circuit, the court concluded that "[t]o subject [the defendant] to an enhancement now, based upon a sentence that he could have received only after the exercise of procedural safeguards, would compromise not only [the defendant's] statutory rights, but his due process rights as well." *Williams*, 326 F.3d at 540. It therefore held that the defendant's prior conviction did not qualify as an ACCA predicate offense.

In sum, no square circuit conflict exists with respect to Section 924(e). The Seventh Circuit in *Henton* and *Perkins* and the Fourth Circuit in *Williams* decided an issue different from the one addressed by the court below. And the Fifth Circuit's decision in *Mutascu* is based on entirely different statutory language. That, in turn, leads to two conclusions. First, the issue plainly is not a frequently occurring question of national importance that has divided the courts of appeal. [3]

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[3] Two days before we filed this brief, the First Circuit in *United States* v. *Duval*, No. 05-2163, 2007 WL 2253505 (1st Cir. Aug. 7, 2007), interpreted the separate ACCA provision defining "violent felony" as "any crime punishable by imprisonment for a term exceeding one year," to require a court to take into account recidivist enhancement of the sentence for the offense under state law, regardless of whether state law has classified the crime as a misdemeanor rather than a violent felony. *Id.* at *16 (quoting 18 U.S.C. § 924(e)(2)(B)). That holding does not create a conflict with the decision below. To begin with, the First Circuit regarded it as crucial that, as a consequence of the enhancement, Maine law treated the defendant's conviction as a felony rather than as a misdemeanor under state law. *Id.* at *16. That treatment had many legal consequences in addition to its effect on the defendant's sentence, leading the First Circuit to conclude that "[i]t would be unusual if a court could not consider Duval's conviction as a felony for ACCA when Maine law would recognize it as such for [these manifold other] state-law purposes." *Ibid.* In the present case, by

The government's inability to identify a square conflict demonstrates that this issue is not a question that frequently arises. Indeed, we have identified only a single additional district court decision involving the issue.[4]

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contrast, the potential, unapplied enhancement did not affect the status under state law of respondent's conviction. There accordingly is every reason to believe that the First Circuit would decide *this* case as did the court below.

In addition, *Duval* does not create a literal conflict with the decision below because it was construing a different provision of ACCA from the one at issue here. The statutory text interpreted by the First Circuit (Section 924(e)(2)(B)) differs significantly from the language of Section 924(e)(2)(A)(ii). Section 924(e)(2)(B) defines "violent felony" as "any *crime* punishable by imprisonment for a term exceeding one year, or any *act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device* that would be punishable for such term if committed by an adult" (emphasis added). In contrast to its use of "offense" to define "serious drug offense" in section 924(e)(2)(A)(ii), Congress's use of the emphasized language in section 924(e)(2)(B) might well, in some circumstances, warrant considering the actual facts regarding the particular offense and particular defendant. The very fact that the language of the provisions differs in a way that might justify different interpretations, moreover, underscores the wisdom of permitting case law on the meaning of ACCA to continue to develop. Review now is not only unnecessary to resolve a genuine conflict about the meaning of section 924(e)(2)(A)(ii); it would also deprive the Court of the benefit of what additional cases might reveal about the complexities involved in looking outside of the offense of conviction to construe the meaning of various discrete provisions of ACCA.

[4] In *United States* v. *Hughley*, No. 04-01402, 2005 U.S. Dist. LEXIS 8612 (E.D. Tenn. Mar. 28, 2005), the district court did not consider or decide the issue presented here. The defendant had a previous drug conviction in Tennessee. The state court had the option of sentencing the defendant as a recidivist, thereby exposing him to a maximum of ten years in prison. *Id.* at *3-4. However,

Second, the lower court decisions do not provide this Court with sufficient information about the varying contexts in which the issue might arise. In order to ensure that its decision is fully informed, the Court should permit additional consideration of the issue by the lower courts.

B. The Decision Below Accords With The Text Of The Statute And This Court's Precedent.

The government asserts (Pet. 7) that the critical point in determining whether a conviction was for a "serious drug offense" within the meaning of Section 924(e) is the maximum sentence for which the defendant was "eligible." But the contours of this "eligib[ility]" test are not at all clear. Thus, the government says that the particular facts of the case should be considered if they trigger a generally applicable state law that enhances sentences for recidivists, and therefore *increase* the maximum sentence. But the facts of the case must be disregarded entirely if they *decrease* the maximum permissible sentence—for example, due to the operation of generally applicable state sentencing law. See Pet. 12-13 n.3. The courts below correctly rejected this vague, one-way ratchet approach to determining whether "an offense" is one for which a "maximum term of imprisonment of ten years or more is prescribed by law," an approach that has no support in the language of the statute or this Court's cases. Pet. App. 16a.

Even though this case involves a question of statutory interpretation, the government does not begin with the language of the statute. Section 924(e) defines a "serious

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doing so would have required violating procedural safeguards under Tennessee law. Therefore, the maximum sentence possible was six years. Applying *Williams*, the court found that this prior conviction did not qualify as an ACCA predicate offense. *Id.* at *4.

The other cases cited by the government (Pet. 17) arise under immigration statutes and the Sentencing Guidelines, which—as we have explained—may involve very different statutory language.

drug offense" as "an offense" for which a "maximum term of imprisonment of ten years or more is prescribed by law." Congress's focus was on the offense, not the particular characteristics of the case or of the offender. See *Taylor*, 495 U.S. at 600 (language of Section 924(e)(1) refers to "crimes falling within certain categories, and not to the facts underlying the prior convictions"). That stands in sharp contrast to the immigration law provision construed in *Mutascu*, which expressly makes relevant the particular sentence imposed for the prior offense. See pp. 8-9, *supra*.[5]

This Court in *Taylor* adopted a "formal categorical approach" to determining whether a state conviction qualifies as an ACCA predicate offense under Section 924(e). 495 U.S. at 600. Courts are to "look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.*; see also *ibid.* ("look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions"); *ibid.* ("look only to the statutory definitions of the prior offenses" and not "consider other evidence concerning the defendant's prior crimes").

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[5] The government's reliance (Pet. 9) on *United States* v. *LaBonte*, 520 U.S. 751 (1997), is wholly misplaced. *LaBonte* involved a statute directing the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term *authorized for categories of defendants*" meeting specified characteristics. 28 U.S.C. § 994(h) (emphasis added). That language focusing on the prison term authorized for "categories of defendants" obviously is different from the text of Section 924(e), which references "an offense" and does not mention "categories of defendants." And it was the language of Section 924(e) that the Court interpreted in *Taylor*. Again, the government is ignoring the specific—and very different—language that Congress used in the two provisions.

The Court derived this rule by considering the language of Section 924(e), the relevant legislative history, and the "practical difficulties and potential unfairness of a factual approach." *Taylor*, 495 U.S. at 600-01. These considerations apply with equal force here.

Whether a defendant was eligible for a recidivist enhancement under the specific provisions of the applicable state law when he or she committed a state offense is a fact particular to that defendant. The government's test would require courts to delve into the requirements of the state enhancement statute and the particular facts regarding the defendant. But *Taylor* directs courts to disregard facts specific to particular cases and individual defendants and instead consider only the offense with which they were charged. The offense is either categorically sufficient to qualify as an ACCA predicate, or, in the alternative, it is categorically insufficient to be a predicate offense. By requesting the court below to consider the particular facts underlying respondent's conviction, the government seeks a rule that is the precise opposite of the one recognized in *Taylor*.[6]

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[6] The government's attempt (Pet. 10) to distinguish *Taylor*, arguing that it applies only to the elements of a crime and not to the length of a sentence, makes no sense. The *Taylor* Court specifically held that courts should not look at facts specific to the state conviction in determining whether it constitutes an ACCA predicate offense. 495 U.S. at 600. A recidivist enhancement necessarily turns on the existence of prior convictions, facts that are specific to each individual defendant. The attempt by the United States to conflate "facts underlying the prior convictions" (*ibid.*) with "elements of a crime" (Pet. 10) is illogical. As is evident here, the fact that a defendant is a recidivist is most certainly a case-specific "fact[] underlying the prior conviction" and not a generic element of the offense, whose applicability may be ascertained simply by reading the statutory text.

Moreover, the government's proposed rule is internally inconsistent—the government advocates taking account of the particular facts of a case only when they increase the maximum permissible sentence. Facts that would decrease the maximum permissible sentence are off-limits.

Thus, the government notes that "respondent's range under Washington's guidelines system was 43-57 months of imprisonment for each of his controlled-substance convictions in Washington." Pet. 13 n.3 (citing C.A. Supp. E.R. 128-29, 147-48, 182-83).[7] In *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis added), this Court held that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." Accordingly, the maximum sentence for which respondent would be eligible was the guidelines maximum of 57 months.

But the government argues that courts should not look outside the specific offense to limitations imposed by state-sentencing guidelines. Pet. 13 n.3. It proposes a rule that is a one-way ratchet: look outside the period of imprisonment of the underlying offense only when state sentencing law will *increase* the maximum term of imprisonment. The reasons for this differential treatment are not at all clear.[8]

The rule urged by the United States is also at odds with this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S.

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[7] We are not arguing here that the judgment below should be upheld because respondent's maximum sentence was limited to 114 months. Rather, we are pointing out the bizarre consequences of the government's self-contradictory rule.

[8] Of course, to the extent that the statute is ambiguous, the rule of lenity compels the construction adopted by the court below. See *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994) (explaining that the rule of lenity requires that a court construe "an ambiguous criminal statute * * * in favor of the accused").

466 (2000), and *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). In *Apprendi*, this Court succinctly stated that "'recidivism does not relate to the commission of the offense.'" *Id.* at 488 (quoting *Almedarez-Torres*, 523 U.S. at 244). The Court has distinguished between the underlying conviction and a sentencing enhancement for recidivism. The decision below respects this long-recognized distinction.

* * * *

This case presents an issue that has not been squarely considered by any other court of appeals. There is no evidence that the issue recurs frequently, it is not dividing the lower courts, and the question simply has not percolated sufficiently to aid this Court's review. Finally, the approach taken by the Ninth Circuit is fully consistent with this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007

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No. 06-1646

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 06-1646

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent contends that, for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. IV 2004), the "maximum term of imprisonment" for a state drug-trafficking offense is the maximum term to which first-time offenders were subject, even for repeat offenders who were subject to a higher maximum. That interpretation accords neither with the text of the ACCA nor with common sense. The ACCA naturally accommodates the possibility that there may be alternative maximum terms of imprisonment for recidivists and non-recidivists. For recidivists, the maximum is the higher term. And if there could be only one maximum term of imprisonment for the offense, it would have to be the highest term that *any* offender could conceivably receive for the offense, not the lower maximum that some subset of offenders could receive. Under respondent's interpretation, a repeat offender's "maximum

term of imprisonment" for the offense would sometimes be less than the term that the offender *actually* received. Respondent offers no adequate justification for such a bizarre and anomalous result.

Respondent contends that the government's interpretation would require federal courts to engage in difficult legal and factual inquiries in order to determine whether a defendant was subject to an enhanced sentence for his prior offense as a recidivist. In most cases, however, it will be clear from the judgment of conviction (or obvious as a matter of law and fact) that the defendant was subject to the requisite heightened maximum. And to the extent that courts applying the ACCA would occasionally have to resolve legal or factual issues in determining whether a defendant was subject to an enhanced sentence as a recidivist, those issues are no different in kind from comparable issues that ACCA courts routinely confront.

Finally, apparently as a fallback argument, respondent suggests that the relevant "maximum term of imprisonment" is the highest term to which the particular defendant was subject under a mandatory state sentencing guidelines scheme. The ACCA's text does not permit that interpretation, however, and Congress cannot be thought to have intended courts to consider potentially intricate offender-specific guidelines calculations in order to identify the maximum term for an "offense." Instead, the relevant "maximum term of imprisonment" for a repeat offender is the highest term that repeat offenders could receive. Because respondent qualifies as a career criminal for purposes of the ACCA under that interpretation, the judgment of the court of appeals should be reversed.

A. The "Maximum Term Of Imprisonment" For A Drug-Trafficking Offense Committed By A Recidivist Takes Into Account Recidivist Enhancements

Although respondent committed his Washington state drug-trafficking offenses as a recidivist, and although Washington imposes heightened maximum terms of imprisonment for recidivist drug offenders, respondent contends (Br. 8-21) that, as to each of his convictions, the "maximum term of imprisonment" for the offense was the highest term to which a hypothetical first-time offender would have been subject. That contention lacks merit.

1. Respondent's interpretation presents two insurmountable textual difficulties.

a. Like the court of appeals, respondent assumes that, under the ACCA, there can be only one "maximum term of imprisonment" for any given offense. See, *e.g.*, Br. 14 (stating the statute "refers to *the* penalty 'prescribed by law' for an 'offense'") (emphasis added). But there is no reason to assume that Congress intended to overlook the pervasive reality in American criminal law that legislatures impose alternative maximum sentences depending on whether an offender is a recidivist. See U.S. Br. 17; *United States* v. *LaBonte*, 520 U.S. 751, 758-759 (1997). Even if Congress had referred only to "the" maximum term of imprisonment for an offense in the ACCA, the statute would naturally be understood to accommodate situations in which a first offense carries one sentence, but a repeat offense carries a harsher one. And for the purpose of determining the maximum sentence for such a repeat offense, "'the maximum term

authorized' for qualifying repeat offenders [would be] the enhanced, not the base, term." *Id.* at 759.[1]

In any event, the ACCA defines a "serious drug offense" as "an offense under State law * * * for which *a* maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added). That language underscores that there may be *alternative* maximum terms of imprisonment for a given offense: *i.e.*, for recidivists and non-recidivists. That is precisely what Washington law provides for the offense at issue here: the maximum term of imprisonment is five years for first-time offenders, but ten years for repeat offenders. See Wash. Rev. Code §§ 69.50.401 (a)(1)(ii)-(iv), 69.50.408(a) (1994).

Respondent argues that Congress's use of the indefinite article "a" in the phrase "a maximum term of imprisonment" was insignificant, because it would have been "awkward and ungrammatical" for Congress to have defined a "serious drug offense" as "an offense under State law * * * for which *the* maximum term of imprisonment of ten years or more is prescribed by law." Br. 16 n.7. But it would have been neither awkward nor ungrammatical for Congress to defined "serious drug

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[1] In order to qualify as a "violent felony" for purposes of the ACCA, a crime must be "punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). Certain crimes that would otherwise qualify as "violent felon[ies]" carry maximum sentences of one year or less for first offenders, but higher maximum sentences for repeat offenders. See *Logan* v. *United States*, 128 S. Ct. 475, 480 n.2 (2007); *Begay* v. *United States*, No. 06-11543 (to be argued Jan. 15, 2008). In such cases, the only two plausible interpretations are that *all* offenders convicted of the offense have committed qualifying "violent felon[ies]," and that only repeat offenders convicted of the offense have done so. As with the definition of "serious drug offense," the latter approach is more consonant with Congress's underlying purposes in enacting the ACCA.

offense" in a slightly different manner: *viz.*, as "an offense under State law * * * for which *the* maximum term of imprisonment *prescribed by law* is ten years or more." In any event, the language that Congress actually used reinforces the inference that Congress intended to accommodate the nearly universal reality that States provide alternative "maximum terms of imprisonment" for recidivist and non-recidivist drug offenders.[2]

Respondent repeatedly notes (Br. 2, 7, 9, 17-18) that the ACCA lists as predicate offenses only "serious drug offense[s]" (and "violent felon[ies]")—and seem-

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[2] Respondent contends (Br. 14) that, if Congress had intended to accommodate the possibility of alternative "maximum terms of imprisonment," it could have provided that a predicate offense would exist where the defendant was "*an offender* subject to a maximum term of imprisonment of ten years for commission of a drug offense." Such an offender-focused statute, however, would arguably lend itself only to respondent's *fallback* interpretation, not to the government's interpretation, because a defendant who was subject to an offense-specific maximum term of imprisonment of ten years or more, but a guidelines maximum of less than ten years, could plausibly contend that his offense would not qualify as a predicate offense under such a statute. Congress's offense-based language precludes resort to state guidelines schemes that may regulate punishment for offenders within the maximum "prescribed by law." See pp. 20-24, *infra*.

Respondent also contends (Br. 15-17) that Congress could have drafted the statute explicitly to refer to the maximum term of imprisonment for different "categories" of offenders, as it did in the statute at issue in *LaBonte*, *supra*. Respondent does not suggest, however, exactly how such a statute could be worded in this context. And respondent offers no answer to the government's principal submission concerning *LaBonte* itself: *i.e.*, that the Court recognized that a statute could establish alternative "maximum" terms of imprisonment for a single offense, depending on whether the defendant is a first-time or repeat offender. See, *e.g.*, 520 U.S. at 758 (noting that, "[i]n calculating the 'highest' term prescribed for a specific offense, it is not sufficient merely to identify the basic penalty associated with that offense").

ingly concludes that a given offense may qualify as an ACCA predicate offense only on an "all-or-nothing" basis (*i.e.*, either for recidivists and non-recidivists alike or for no one). Respondent's apparent conclusion does not follow from his premise. In defining predicate offenses for purposes of the ACCA, Congress not only specified particular offense conduct (in the case of "serious drug offense[s]," the trafficking of controlled substances), but then narrowed those definitions by setting a triggering maximum term of imprisonment (in the case of "serious drug offense[s]," ten years). By describing those offenses as "serious" drug offenses, Congress may have been referring only to the specified offense conduct, while allowing for the possibility that, by virtue of the existence of alternative maximum terms of imprisonment, an offense could qualify as a predicate offense only for some offenders, but not for others.[3] But in any event, it is perfectly rational to conclude that an offense is more "serious" when the defendant was a repeat offender than when the defendant was not. See, *e.g.*, *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948) (noting that an

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[3] Citing the ACCA's legislative history, respondent contends that the Department of Justice proposed the ten-year triggering maximum "to ensure that the ACCA targeted prior convictions for drug importation or exportation." Br. 9 n.4 (internal quotation marks omitted). That is inaccurate. As the cited legislative history reflects, a Justice Department official instead proposed including a reference to the Controlled Substances Import and Export Act for that purpose (in the definition of "serious drug offense"). See *The Armed Career Criminal Act Amendments: Hearings on S. 2312 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 10 (1986) (statement of Deputy Assistant Attorney General Knapp).

offense committed by a recidivist is an "*aggravated offense* because a repetitive one") (emphasis added).[4]

Respondent likewise errs in arguing (Br. 12-13) that the "categorical" approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), means that only the penalty based on the elements of the offense counts under the ACCA. The categorical approach of *Taylor* does not speak to the identification of the "maximum term of imprisonment" for the offense, and, in any event, recidivist penalties *are* imposed for the underlying offense. See U.S. Br. 23-26.

Respondent suggests (Br. 17) that, under the government's interpretation, "offenses that almost universally are regarded as *less* than serious" would nevertheless qualify as "serious drug offense[s]" under the ACCA. The sole example cited by respondent does not support that proposition. Respondent notes that, under Michigan law, a repeat offender who distributes tablets containing codeine would have committed a "serious drug offense" under the government's interpretation. See Br.

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[4] Respondent suggests that, with regard to "violent felon[ies]," the government's interpretation would "lead to the anomalous result that a *misdemeanor* offense could qualify as a 'violent felony,'" where an offense is classified as a misdemeanor under state law but repeat offenders are subject to a maximum term of imprisonment of more than one year. Br. 19. Respondent overlooks 18 U.S.C. 921(a)(20), which defines the phrase "crime punishable by imprisonment for a term exceeding one year" (for purposes of the definition of a "violent felony") to *exclude* "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." The ACCA therefore expressly contemplates that, where an offense that otherwise qualifies as a "violent felony" is classified as a misdemeanor but the relevant maximum term of imprisonment exceeds two years, the offense will qualify as an ACCA predicate. See, *e.g.*, *Logan*, 128 S. Ct. at 480 & n.2.

18 n.9; see also Crim. Law Profs. Br. 11-12 (citing similar example under South Dakota law). A *first-time* offender who distributes tablets containing codeine in violation of Michigan law, however, would be subject to a maximum term of imprisonment of seven years; a repeat offender would be subject to a maximum term of 14 years, and an offender with three previous felony convictions would be subject to a maximum term of life. See Mich. Comp. Laws Ann. §§ 333.7401(2)(b)(ii), 333.7413 (2), 769.12(1)(a) (West 2001 & Supp. 2007); cf. 21 U.S.C. 812(c), 841(b)(1)(D) (setting maximum federal penalty for distribution of Schedule III controlled substances, such as mixtures containing codeine, at five years for first-time offenders and ten years for repeat offenders). Given the severity of the penalty even for first-time offenders, the offense at issue in respondent's example is plainly "serious," even if it is true that the offense would qualify as an ACCA predicate offense only for repeat offenders.

More broadly, in order to constitute a "serious drug offense" under the ACCA, a state offense must involve the trafficking of a controlled substance (as defined by federal law). See 18 U.S.C. 924(e)(2)(A)(ii). It is questionable whether *any* offense involving the trafficking of such a substance could be said to be "almost universally * * * regarded as *less* than serious," as respondent contends. Br. 17. Even if it could, however, the ACCA's reliance on the penalties imposed by state law means that States will have some legislative discretion effectively to determine whether such an offense qualifies as an ACCA predicate offense. Cf. NACDL Br. 9 (noting that "Congress, following federalist impulses, simply set

ten years as a mark of general seriousness, and left it to the states to decide when that threshold is satisfied").[5]

Respondent repeatedly suggests that "a court should look to the penalty assigned by the legislature to a conviction for engaging in conduct constituting the elements of the offense." Br. 7; see Br. 10, 21, 46. Where a State exposes repeat offenders to a higher penalty than first-time offenders, however, the higher recidivist penalty is just as much "a penalty assigned by the legislature * * * for engaging in conduct constituting the elements of the offense" as the lower non-recidivist penalty, because recidivism is not an offense element and the recidivist penalty merely constitutes a "stiffened penalty for the latest crime." *Gryger*, 334 U.S. at 732.[6] The analysis is no different simply because the higher recidivist penalty is codified in a discrete statutory provision (as is the case here). Application of the ACCA turns on the relevant maximum term of imprisonment for the offense, not on the details of its codification.

b. Of course, respondent's elaborate effort to read the ACCA as requiring a single "maximum term of imprisonment" for each offense avails respondent of nothing, because, if there must be a *single* maximum, it is clearly the *higher* one for recidivists. Like the court of

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[5] If, for example, Michigan were to provide that the maximum term of imprisonment for the distribution of tablets containing codeine was ten years for *all* offenders, that offense would unquestionably qualify as an ACCA predicate offense, regardless whether the government's or respondent's interpretation of the statute is the correct one.

[6] In support of the contrary proposition, respondent cites (Br. 11) *United States* v. *Doe*, 960 F.2d 221 (1st Cir. 1992) (Breyer, C.J.). *Doe* is obviously inapposite, however, because it involved the question whether the crime of possessing a firearm as a convicted felon constitutes a "violent felony" for purposes of the ACCA. See *id.* at 223-225.

appeals, respondent concludes that the single maximum term is the maximum for first-time offenders. But as a matter of logic, the true maximum term of imprisonment for an offense is necessarily the highest term that *any* offender could conceivably receive—not the highest term that some subset of offenders could receive (even if other offenders could receive a still higher term). In a choice between two possible maximum sentences for the same offense, it would seem difficult to pick the lower one. Cf. *United States* v. *Hernandez*, 79 F.3d 584, 595 (7th Cir. 1996) (noting that "[t]he word 'maximum' naturally connotes the upper limit of a range, or the greatest quantity possible or permissible," and that, "where a statute provides two tiers of punishment, common sense suggests that the maximum falls at the upper limit of the higher of the two tiers").

Respondent concedes (Br. 20-21) that, under his interpretation, a repeat offender's "maximum term of imprisonment" would sometimes be less than the term of imprisonment that the offender actually received. Respondent fails to justify such a bizarre and anomalous result. Instead, respondent merely asserts (Br. 21), without elaboration, that "[t]he sentence imposed on any given defendant is immaterial in making this 'categorical' determination." But if the ACCA truly requires a "categorical" determination—*i.e.*, that any given offense possess only a single "maximum term of imprisonment"—it simply does not follow that the "categorical" maximum is the highest term that a *first-time* offender could conceivably receive, rather than the highest term that *any* offender could conceivably receive. As a matter of common sense, the "maximum term of imprisonment" for the offense, in the case of a repeat offender, must be at least as high as the sentence that the of-

fender actually received for that offense. Certainly, nothing in the ACCA's text suggests otherwise.[7]

2. Respondent's interpretation is inconsistent not only with the text of the ACCA, but also with Congress's underlying purposes in enacting it. As respondent's amici note, enhanced penalties for recidivists are (and have long been) a ubiquitous feature of the criminal justice system. See, *e.g.*, Crim. Law Profs. Br. 7-8. It is hard to imagine that Congress would have wanted to ignore those enhanced penalties in determining the relevant "maximum term of imprisonment" for a defendant's prior offenses. Such an approach would be especially counterintuitive because the ACCA is itself a statute that enhances sentences for recidivists. Neither respondent nor his amici cite anything in the legislative history suggesting that Congress, while imposing its own enhanced recidivist penalties, intended sentencing courts to ignore recidivist penalties imposed for prior offenses.

Respondent contends (Br. 20) only that the government's interpretation is problematic as a policy matter because it would lead to "a sort of perverse bootstrapping," in which a defendant's prior recidivist status would make it easier for the defendant to qualify as a

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[7] Respondent contends (Br. 21) that the government's interpretation would give rise to an anomaly of its own, insofar as the "maximum term of imprisonment" for a repeat offender would frequently be higher than the maximum term of imprisonment to which the offender would be subject under a mandatory state sentencing guidelines scheme. There is nothing anomalous about that result, because the ACCA focuses on maximum terms of imprisonment for the *offense*, not for each particular *offender*. Even under respondent's preferred construction, moreover, the same "anomaly" would frequently occur: for example, where the statutory "maximum term of imprisonment" for a *first-time* offender would be higher than the maximum term of imprisonment to which the offender would be subject under a mandatory guidelines scheme.

career offender under the ACCA. There is nothing unusual, however, about such so-called "double counting," in which a prior offense not only could qualify as a predicate offense itself but could render a subsequent offense a predicate offense as well. For example, California's "three strikes" law, which this Court recently upheld against an Eighth Amendment proportionality challenge, operates in precisely that fashion. See *Ewing* v. *California*, 538 U.S. 11, 16 (2003) (plurality opinion). And a reading of the ACCA that permits such "double counting" is entirely consistent with Congress's overarching policy objective of "increas[ing] the participation of the Federal law enforcement system in efforts to curb armed, habitual drug traffickers and violent criminals." H.R. Rep. No. 849, 99th Cong., 2d Sess. 1 (1986).

3. Finally, respondent contends (Br. 47-49) that his interpretation of the ACCA is supported by the rule of lenity. As a preliminary matter, the rule of lenity has less force where the relevant question is not whether a defendant's primary conduct is criminal, but rather whether a defendant is subject to a longer sentence for indisputably criminal conduct based solely on the legal classification of prior convictions, because the fundamental purposes of the rule are to ensure that defendants have fair warning of the boundaries of criminal conduct and that Congress, not the judiciary, defines criminal liability. See *Crandon* v. *United States*, 494 U.S. 152, 158 (1990).

In any event, to the extent that the rule of lenity has force in this context, it is inapplicable here. The rule of lenity comes into play only when there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Con-

gress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). The ACCA's definition of "serious drug offense" suffers from no such "grievous ambiguity." The most natural reading of that statutory provision is that it accommodates the possibility of alternative maximum terms of imprisonment for recidivists and non-recidivists. The only arguable alternative construction would be that the single "maximum term of imprisonment" for the offense is the maximum that *any* offender could receive. The rule of lenity cannot justify the adoption of an interpretation, such as respondent's preferred construction that the "maximum term of imprisonment" for *all* offenders is the maximum for *first-time* offenders, that the statutory text does not permit. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 66 (1997).

B. Determining The "Maximum Term Of Imprisonment" For Repeat Offenders Does Not Create Insuperable Practical Difficulties

Relying on this Court's decisions in *Taylor*, *supra*, and *Shepard* v. *United States*, 544 U.S. 13 (2005), respondent contends (Br. 21) that the government's interpretation of the ACCA would require federal courts to "engage in difficult inquiries regarding novel questions of state law and complex factual determinations about long-past proceedings in state courts." Respondent greatly overstates the practical difficulties that would arise under the government's interpretation—and, in any event, those practical difficulties provide an insufficient basis for refusing to afford the text its most natural meaning.

1. For the mine run of potential ACCA predicate offenses, it will be clear from the judgment of conviction

for the predicate offense—or from other comparable judicial records, such as the presentence report or sentencing transcript—that the defendant was subject to the requisite maximum sentence. See J.A. 16, 42, 93. Courts typically need to determine the applicable minimum and maximum before imposing sentence, because, where a defendant is sentenced under a sentencing guidelines scheme, the guidelines range may extend above or below the offense-specific statutory range.[8] Thus, in the federal system, the presentence report ordinarily lists the statutory range alongside the Guidelines range. See, *e.g.*, PSR ¶¶ 119-123, at 18. And in the Washington system, the judgment form itself lists the offense-specific statutory maximum on a line next to the guidelines range. See J.A. 16, 42, 93; NACDL Br. 8. In those cases, federal sentencing courts will find it easy to determine whether a defendant was subject to the qualifying maximum sentence for the prior offense.

In many other cases, it will be obvious, as a matter of law and fact, that the defendant was subject to the requisite maximum sentence. Most obviously, there will be cases in which the length of the sentence itself makes clear that the defendant was sentenced as a recidivist. There will also be cases in which the relevant recidivism statute is easy to apply. For example, the Washington recidivism statute at issue here—which was part of the Uniform Controlled Substances Act, see § 413, 9 U.L.A.

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[8] Under Washington law, for example, a defendant who committed the same offense as respondent—delivery of a Schedule III, IV, or V controlled substance—could have been subject to a presumptive guidelines sentence of up to 84 months, even if the defendant had not committed another drug-trafficking offense (and was therefore subject to the five-year statutory maximum for first-time offenders). See Wash. Rev. Code §§ 9.94A.310, 9.94A.420 (1994).

778-779 (1994), and has been passed in identical form by numerous other States—applies whenever a defendant has a previous conviction "under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs." Wash. Rev. Code § 69.50.408(a) (1994). Respondent not only had three convictions for delivery of a Class III-V controlled substance under Washington law (for offenses committed on different dates), see J.A. 14, 40, 91, but also had a 1986 California conviction for being under the influence of controlled substances (specified in the information as cocaine and heroin), see PSR ¶¶ 51-53, at 9; Cal. Health & Safety Code § 11550 (West 2002).[9] Even if the judgments had not reflected the fact that respondent was subject to a ten-year maximum sentence as a repeat offender for each of his three Washington convictions, therefore, it would be clear that respondent was in fact subject to that higher maximum.

2. Respondent contends that there could be cases in which federal courts would be required to resolve disputed issues of law or fact in order to determine whether the defendant was subject to the requisite maximum sentence for his prior offense. With regard to legal issues, respondent cites cases—none of which actually arises in the ACCA context—in which there is a question

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[9] For that reason, it is irrelevant whether any of respondent's Washington convictions was "prior" to another for purposes of the Washington recidivism statute. See Resp. Br. 27 n.11. Notably, the Washington state court that convicted respondent of the drug-trafficking offenses concluded that he was subject to the higher maximum sentence as a repeat offender for *all three* of those convictions—thereby suggesting that the court likewise relied on his 1986 California conviction. See J.A. 16, 42, 93.

whether one conviction is "prior" to another (and therefore constitutes a predicate offense) for purposes of a state recidivism statute. See Br. 25-26. In many of the cases respondent cites, however, state courts merely applied settled legal rules for determining when a conviction is "prior." See, *e.g.*, *Koonsman* v. *State*, 860 P.2d 754, 755-756 (N.M. 1993); *Graham* v. *State*, 435 N.E.2d 560, 561 (Ind. 1982). More generally, to the extent that federal courts would occasionally have to confront issues of state law in determining whether a defendant was subject to the necessary maximum sentence, those issues are no different in kind from other state-law issues that federal courts routinely address in applying the ACCA—such as whether the elements of a state-law offense are sufficient to render the offense a "violent felony," see *Taylor*, 495 U.S. at 600; whether a defendant has received a "conviction" for a predicate offense in state court (as opposed to, for example, a deferred adjudication), see S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984); and whether a *first-time offender* was subject to the requisite maximum sentence. There is no reason to believe either that cases presenting state-law issues in this context are likely to be common, or that resolution of those issues is likely to be complex.

With regard to factual issues, respondent cites cases—again, none of which actually arises in the ACCA context—in which there is a question whether a conviction from another State would qualify as a conviction for a predicate offense for purposes of a state recidivism statute governing a later offense. See Br. 27-31. Where it is unclear from the judgment of conviction whether the defendant was subject to the requisite maximum sentence, however, the government presumably would bear the burden of proof as to any relevant factual is-

sues: in respondent's example, the government would be required to prove the presence of any fact necessary to render the prior offense a qualifying predicate under the pertinent state law. And where records pertaining to the relevant factual issue are unavailable, the government would be unable to rely on the later offense as an ACCA predicate. In any event, as with cases presenting legal issues, there is no reason to believe either that cases presenting unresolved factual issues in this context are likely to be common, or that resolution of those issues is likely to be complex.[10]

3. Respondent observes (Br. 35-37) that, under the government's interpretation, an offense could sometimes qualify as an ACCA predicate offense even if the state court did not actually apply a higher maximum sentence to the defendant as a repeat offender, on the ground that the higher maximum sentence *could* have been ap-

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[10] Citing *Shepard*, respondent contends (Br. 30) that allowing federal courts to resolve factual issues concerning prior convictions would "raise serious constitutional concerns." Lower courts have consistently held, however, that courts may constitutionally determine not only whether a defendant was previously convicted, but also whether the prior conviction qualifies as a predicate offense for purposes of various federal statutes (including the ACCA). See, *e.g.*, *United States* v. *Morris*, 293 F.3d 1010, 1013 (7th Cir.), cert. denied, 537 U.S. 897 (2002); *United States* v. *Kempis-Bonola*, 287 F.3d 699, 703 (8th Cir.), cert. denied, 537 U.S. 914 (2002). And to the extent that the constitutional-avoidance concerns on which a plurality of the Court relied in *Shepard* are applicable to the resolution of factual issues concerning predicate offenses once removed (*i.e.*, predicate offenses to potential ACCA predicate offenses), those concerns could be addressed simply by applying the "modified" categorical approach of *Taylor* and *Shepard* and limiting federal courts, in resolving those factual issues, to consideration of judgments and other comparable judicial records.

plied.[11] Respondent asserts (Br. 35) that, in that situation, finding an enhanced maximum would "upset[] the balance between federal and state courts" and thereby violate principles of federalism. Such a situation, of course, is not presented here, but in any event that situation does not raise federalism concerns. The ACCA imposes a stiffened penalty on qualifying repeat offenders for a *federal* offense: *viz.*, the offense of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). See, *e.g.*, S. Rep. No. 190, 98th Cong., 1st Sess. 8 (1983) (noting, with regard to prior version of the ACCA that would have criminalized possession of a firearm during a robbery or burglary, that "[the ACCA's] punishment of imprisonment for at least fifteen years is based entirely on the present offense, not on the defendant's 'status' as a 'career criminal'"). Just as federal law could validly impose a heightened penalty for a federal offense based on a predicate offense that would not serve as a basis for a heightened penalty for a state-law offense at all, so too can the ACCA impose a heightened penalty for a federal offense based on a predicate offense that *could* serve as a basis for a heightened penalty for a state-law offense, even if it did not in fact do so. Such an interpretation of the ACCA in no way works a "federal intrusion into state criminal adjudications" of the type that would raise structural constitutional concerns. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000).

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[11] For example, where a state prosecutor failed to provide the requisite notice that he was seeking an enhanced sentence or where the sentencing court had discretion not to apply a recidivism enhancement, an offense could still qualify as an ACCA predicate offense as long as the defendant was *eligible* for the requisite enhancement. See, *e.g.*, *United States* v. *Henton*, 374 F.3d 467, 470 (7th Cir.) (per curiam), cert. denied, 543 U.S. 967 (2004).

4. Respondent's various (and, in the ACCA context, hypothetical) examples of disputed legal and factual issues relating to recidivist enhancements are insufficient to justify respondent's interpretation of the ACCA, which would preclude the government from *ever* showing that a defendant was subject to the requisite maximum sentence for his prior offense by virtue of his status as a repeat offender. At most, those examples would support adoption of an analogous approach to that taken by the Court in *Taylor* and *Shepard*, under which a court would be permitted to resort to judicial records in order to establish whether a defendant was *determined* to be subject to the requisite maximum sentence as a repeat offender. In this case, respondent would unquestionably lose under that approach, since (as the district court noted, see J.A. 165) the judgments for each of his three Washington drug-trafficking convictions plainly indicate that he was subject to the ten-year maximum sentence for repeat offenders. See J.A. 16, 42, 93; see also NACDL Br. 8 (conceding that judgments are "documents that this Court has already held proper to consider" under *Taylor* and *Shepard*).[12]

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[12] Respondent notes (Br. 4-5) that, while he expressly acknowledged in the plea statement for one of his convictions that "[t]he crime with which I am charged carries a maximum sentence of 10 years imprisonment," J.A. 28, the plea statements for the other two convictions left the maximum sentence for the offense blank, apparently inadvertently, see J.A. 54, 105. Each of those two plea statements, however, indicated that respondent was subject to a $20,000 fine, see *ibid.*—a maximum fine that, under Washington law, is applicable only to repeat offenders who are also subject to the heightened ten-year maximum sentence, see Wash. Rev. Code §§ 69.50.401(a)(1)(ii)-(iv), 69.50.408(a) (1994).

C. The "Maximum Term Of Imprisonment" For An Offense Is Not The Maximum Sentence To Which A Particular Offender Was Subject Under A Mandatory State Sentencing Guidelines Scheme

Apparently as a fallback argument, respondent contends (Br. 38-46) that, if statutory maximums for recidivists and non-recidivists are recognized as relevant "maximum term[s] of imprisonment," lower maximums under a mandatory state sentencing guidelines scheme should be recognized as well. That contention—which respondent concededly failed to advance in the courts below—lacks merit.

1. The text of the ACCA does not permit an interpretation under which the relevant "maximum term of imprisonment" is the maximum sentence to which a particular offender was subject under a mandatory state sentencing guidelines scheme. As respondent correctly notes (Br. 7), the ACCA focuses on "a maximum term of imprisonment" *for the underlying offense*. Its language does not invite consideration of individualized "maximum term[s] of imprisonment" for every offender, based on the potentially infinite combinations of facts about an offender's conduct that may give rise to the offender's guidelines range. Although respondent asserts otherwise (Br. 43), sentencing guidelines schemes often set a different "maximum" for each offender; in the federal system, for example, that maximum is determined by the offender's total offense level (which, in turn, depends on the applicability of a variety of adjustments) and criminal history category, and may also be affected by upward or downward departures. See Sentencing Guidelines Ch. 5, Pt. A (sentencing table). Treating a particular offender's guidelines maximum as the rele-

vant "maximum" for purposes of the ACCA would render meaningless the ACCA's reference to "a maximum term of imprisonment" for the offense.

Respondent repeatedly contends (Br. 8, 21, 22, 24, 25, 27, 38, 39, 41, 44, 45) that the government's theory is that the relevant "maximum" is the maximum that a particular offender "actually faced"—and that it necessarily follows that the relevant "maximum" is the maximum to which the offender was subject under an applicable mandatory guidelines scheme. But Congress should not be held to have adopted a case-specific sentencing system in the ACCA, with all of its complexities, simply because Congress naturally would have expected the recidivist-enhanced maximum term to be the relevant "maximum" for a repeat offender. The latter is all that the text of the ACCA contemplates.

2. Respondent cites no evidence from the legislative history suggesting that Congress intended that determinations under guidelines systems would control the "maximum term of imprisonment * * * prescribed by law" to which a defendant was exposed. The absence of any such evidence is unsurprising, because, when Congress passed the ACCA in its current form in 1986, Congress had already provided for the promulgation of federal sentencing guidelines—and, in so doing, indicated that offense-specific statutory maximums remained discrete (and unaffected). See, *e.g.*, 28 U.S.C. 994(r). Moreover, Congress was well aware of the fact that some States had implemented guidelines schemes of their own. See S. Rep. No. 225, 98th Cong., 1st Sess. 61-62 (1983).

More broadly, it is difficult to believe that Congress would have wanted to focus on the maximum sentence to which a particular offender was subject under a manda-

tory guidelines scheme, because such an interpretation would dramatically narrow the ACCA's reach. For example, where a state drug-trafficking offense bore a maximum sentence of ten years for first-time offenders and repeat offenders alike, but where the State at issue had a mandatory sentencing guidelines scheme, the offense would likely qualify as an ACCA predicate offense only for a very small percentage of offenders, because the guidelines maximum for all but the very worst offenders would presumably fall short of the requisite ten-year statutory maximum. Accordingly, no court construing the phrase "maximum term of imprisonment" in the ACCA (or similar phrases elsewhere in the ACCA or in other statutes) has concluded that the relevant "maximum" is "the maximum sentence available in the particular case under the sentencing guidelines," rather than "the statutory maximum sentence for the offense," *United States* v. *Murillo*, 422 F.3d 1152, 1154-1155 (9th Cir. 2005), cert. denied, 547 U.S. 1119 (2006); instead, courts have disagreed only about the relevant *offense-specific* maximum.

3. A regime that required ACCA sentencing courts to determine the maximum sentence for each offender under the applicable sentencing guidelines system would present practical difficulties that would far outstrip those that respondent alleges would be presented by a regime that required a determination of recidivist status alone. To be sure, in many cases, the judgment of conviction would indicate the applicable guidelines sentencing range, just as it would the applicable offense-specific statutory sentencing range. As this Court has noted, however, courts applying mandatory guidelines systems were typically not *required* to increase a given offender's sentence based on aggravating factors—and, as

a result, those courts would not necessarily have memorialized the "maximum" guidelines sentence for which the offender was eligible. See *Blakely* v. *Washington*, 542 U.S. 296, 305 n.8 (2004). And because the factors that go into the calculation of an offender's guidelines range can be numerous and complex, there would be far fewer cases in which it would be obvious to an ACCA sentencing court that the defendant was subject to the requisite maximum sentence, where the judgment (or other comparable judicial records) did not so indicate. In short, there is no basis in the ACCA's text, legislative history, or policy to limit the phrase "maximum term of imprisonment" to the guidelines maximum applicable to a particular offender.

4. Amicus NACDL contends (Br. 3-11) that this Court should effectively reach the same result by holding, first, that respondent's "offense" for ACCA purposes is the offense of delivery of a Schedule III, IV, or V controlled substance *in the absence of aggravating factors*, and, second, that the "maximum term of imprisonment" for that "offense" is the maximum to which an offender was subject in the absence of aggravating factors under Washington's mandatory guidelines scheme. That argument fails for the simple reason that, at the time respondent committed his offense, the Washington State Legislature had defined the relevant offense as delivery of a Schedule III, IV, or V controlled substance—and had treated aggravating factors as sentencing factors to be determined by the court, rather than offense elements to be determined by the jury. See Wash. Rev. Code §§ 9.94A.120(2), 9.94A.390, 69.50.401(a)(1)(ii)-(iv) (1994); see also *Liparota* v. *United States*, 471 U.S. 419, 424 (1985) (explaining that "[t]he definition of the elements of a criminal offense is entrusted to the

legislature"). The maximum term of imprisonment for *that* offense was ten years for repeat offenders such as respondent—even if a repeat offender could actually *receive* a ten-year sentence only in the presence of aggravating factors.

It is true that, in the wake of this Court's decision in *Blakely*, which held that aggravating factors that raise a defendant's maximum sentence under a mandatory state sentencing scheme may no longer constitutionally be determined by a court, many state legislatures (including Washington's) "*Blakely*-ized" their state sentencing schemes by requiring the submission of aggravating factors to the jury. See, *e.g.* Wash. Rev. Code § 9.94A.537(3) (2006). Even for predicate offenses committed *after* those amended sentencing schemes took effect, it is not clear that, for ACCA purposes, the "offense" of delivery of a Schedule III, IV, or V controlled substance under Washington law is distinct from the "offense" of delivery of such a controlled substance plus an aggravating factor (such as occupying a high position in the drug distribution hierarchy, see Wash. Rev. Code § 9.94A.535(3)(e)(iv) (2006)). Washington, for example, retained its statutory penalty ceilings for its drug-trafficking offenses, which constitute potentially available maximum terms of imprisonment for those offenses. But however that issue should be resolved, the predicate offenses in this case took place well before the Court's decision in *Blakely* (and, for that matter, the Court's earlier decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000))—and there is no justification for creating the retroactive legal fiction that aggravating factors were offense elements even *before Blakely* for purposes of defining the relevant "offense" under the ACCA.

D. If Adopted By This Court, The Court Of Appeals' Interpretation Will Have Adverse Consequences For The Application Of The ACCA And Other Statutes

Respondent concedes (Br. 19) that, if his interpretation of the ACCA is adopted, it would exclude from the ACCA's scope not only recidivists who were subject to ten-year maximum sentences as repeat offenders for federal or state drug-trafficking offenses (under the ACCA's definition of a "serious drug offense," see 18 U.S.C. 924(e)(2)(A)(i)-(ii)), but also recidivists who were subject to one-year maximum sentences as repeat offenders for federal or state violent felonies (under the ACCA's definition of a "violent felony," which covers "any crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. 924(e)(2)(B)). See p. 4 n.1, *supra*. That interpretation would substantially narrow the scope of the ACCA, because it stands to reason that many of the individuals who are potentially subject to the ACCA (because they have committed three prior offenses) would have been subject to recidivist enhancements for at least some of those prior offenses.[13] In fact, the same issue has arisen in both of the other ACCA cases that the Court has agreed to hear on the merits thus far this Term. See *Logan* v. *United States*, 128 S. Ct. 475, 480 n.2 (2007); U.S. Br. at 44-45, *Begay* v. *United States*, No. 06-11543 (to be argued Jan. 15, 2008).

Moreover, respondent does not dispute that his interpretation, if adopted by this Court, could have ramifications for the interpretation of a range of other vitally important federal laws. Numerous other provisions im-

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[13] At least 28 States have statutes defining drug-trafficking offenses with maximum sentences of less than ten years for first-time offenders, but ten years or more for repeat offenders. See U.S. Br. 36 n.13.

pose more severe sanctions on individuals who have been convicted of "crimes" (or "offenses") that are "punishable" by "a maximum term of imprisonment" (or "imprisonment") for more than a specified term of years. See, *e.g.*, 18 U.S.C. 922(g)(1) (felon-in-possession statute), 1961(1)(A) (definition of "racketeering activity" under Racketeer Influenced and Corrupt Organizations Act), 3559(c)(2)(F)(ii) (definition of "serious violent felony" in federal "three strikes" statute); 21 U.S.C. 802 (44) (definition of "felony drug offense" in Controlled Substances Act); Guidelines § 4B1.2(a)-(b) (definitions of "crime of violence" and "controlled substance offense" in "career offender" guideline). And the Ninth Circuit—the only court of appeals to have adopted respondent's interpretation—has already used the same approach to exclude recidivist enhancements under still other provisions. See *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1208-1211 (2002) (en banc) (definition of "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G)); *United States* v. *Arellano-Torres*, 303 F.3d 1173, 1178 (2002) (definition of "drug trafficking crime" in 18 U.S.C. 924(c)(2)), cert. denied, 358 U.S. 915 (2003). If this Court were to give the Ninth Circuit's interpretation nationwide effect, therefore, it would likely have pernicious consequences outside the ACCA context as well. In all events, that interpretation cannot be squared either with the text of the ACCA or with common sense—which dictates that the "maximum term of imprisonment" for a repeat offender is the maximum that repeat offenders could receive.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JANUARY 2008

(3)

No. 06-1646

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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GINO GONZAGA RODRIQUEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent contends (Br. in Opp. 4-16) that this Court should not grant certiorari because there is no circuit conflict on the question whether recidivist enhancements to prior offenses should be taken into account in determining the maximum sentence that could have been imposed on a recidivist offender for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. IV 2004), and because the Ninth Circuit has correctly held that they should not. Since the filing of the petition for certiorari, however, the First Circuit has joined two other circuits in holding that recidivist enhancements should be taken into account; in so doing, it cited and then rejected the Ninth Circuit's approach. Respondent's labored efforts to distinguish that decision, and the similarly irreconcilable decisions of other circuits, are unavailing. Respondent's arguments in defense of the Ninth Circuit's decision also lack merit. If it is allowed to stand, the Ninth Circuit's decision will limit the government's ability to obtain appropriate sentences for dangerous career offenders in

the Nation's largest circuit—and the underlying approach it embodies is already having adverse consequences in other areas of the law. The petition for certiorari should therefore be granted.

1. Contrary to respondent's contentions (Pet. 5-12), the decision below either conflicts or is in tension with the decisions of other courts of appeals.

a. In *United States* v. *Duval*, No. 05-2163, 2007 WL 2253505 (Aug. 7, 2007), the First Circuit held that a Maine conviction for assault constituted a violent felony "punishable by imprisonment for a term exceeding one year" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B), because, under the assault statute's recidivist sentencing provision, the defendant was sentenced to the maximum sentence of five years in prison. 2007 WL 2253505, at *12-*16. In holding that the recidivist sentencing statutes should be considered in determining the maximum sentence that could have been imposed, the First Circuit acknowledged the defendant's contention that such a holding would conflict with the Ninth Circuit's holding in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), on which the panel relied in this case. 2007 WL 2253505, at *13. The First Circuit nevertheless considered the recidivist enhancement, relying on one of the *dissenting* opinions in *Corona-Sanchez* to dismiss concerns that only recidivism had raised the assault from a misdemeanor to a felony. *Id.* at *16 (citing 291 F.3d at 1219 (opinion of Kozinski, J.)).

Respondent offers two bases for distinguishing *Duval*, each of which lacks merit. Respondent first contends (Br. in Opp. 11 n.3) that *Duval* does not "literal[ly]" conflict with the decision below because it involves the definition of a "violent felony," not a "serious drug offense," under the ACCA. The two definitions,

however, are functionally indistinguishable for purposes of the question presented in the petition, as both embrace the same approach in focusing on the maximum term available for an offense. The ACCA defines "violent felony" to include certain state-law crimes "punishable by imprisonment for a term exceeding one year," 18 U.S.C. 924(e)(2)(B), and it defines "serious drug offense" to include certain state-law offenses "for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii). Under *Corona-Sanchez* and the decision below, the Ninth Circuit would clearly construe both provisions of the ACCA to exclude consideration of recidivist enhancements.

Respondent also contends (Br. in Opp. 10-11 n.3) that, in *Duval*, the First Circuit "regarded it as crucial" that the underlying offense was treated as a felony, rather than a misdemeanor, as a matter of state law. The First Circuit did note the "conundrum[]" that, under the ACCA, a person could be convicted of three "violent felonies" even if, but for the person's prior recidivism, one or more of the offenses would have been classified as misdemeanors under state law. See 2007 WL 2253505, at *14. But the court ultimately concluded that Maine *did* treat respondent's offense as a felony because of his enhanced punishment as a recidivist, and thus treated it as a qualifying offense under the ACCA. See *id.* at *16. The court thus held that, under the ACCA, recidivist enhancements should be taken into account in determining the maximum sentence that could have been imposed for a predicate offense—a holding that squarely conflicts with the holding below. And in any event, because *Duval* and this case both involved felonies under state law, the two cases are factually indistinguishable in all relevant senses.

b. Respondent asserts (Br. in Opp. 6-7) that the decision below does not conflict with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467 (per curiam), cert. denied, 543 U.S. 967 (2004), because the defendant in *Henton* argued only that the prosecutor failed to seek a recidivist enhancement under state procedure (and not that recidivist enhancements should not be considered in determining the maximum sentence that could have been imposed). As respondent notes (Br. in Opp. 6), the Seventh Circuit rejected the procedural argument on the ground that "the statute does not contain any prerequisites, other than recidivism, to qualify for the extended term." *Henton*, 374 F.3d at 469.

As respondent conspicuously fails to note, however, in the very next sentence, the Seventh Circuit reasoned that, "[m]ore importantly, it is irrelevant under ACCA whether [the defendant] actually received an extended sentence on his [prior] conviction; what matters is the sentence that the state statute made possible." *Henton*, 374 F.3d at 470. The court concluded that, "[b]ecause [the defendant] was eligible for up to fourteen years' imprisonment, the district court properly concluded that the [prior] conviction qualifies as a 'serious drug offense' under ACCA." *Ibid.* Regardless of what the defendant argued in his brief, that reasoning plainly constitutes a holding, rather than dicta, because the Seventh Circuit could not have affirmed the application of the ACCA to the defendant without concluding that recidivist enhancements could be considered. Consistent with that view, the Seventh Circuit, in reaching the same result in a later case, described *Henton* as "*appl[ying] th[e] rule*" that the ACCA "inquires about the highest possible penalty": *i.e.*, the penalty applicable to a recidivist offender. *United States* v. *Perkins*, 449 F.3d 794, 796 (emphasis

added), cert. denied, 127 S. Ct. 330 (2006). As the Ninth Circuit acknowledged (Pet. App. 16a n.6), therefore, *Henton* also conflicts with the decision below.

c. Respondent seeks to distinguish *Mutascu* v. *Gonzales*, 444 F.3d 710 (5th Cir. 2006) (per curiam) (Br. in Opp. 8-9), because it involved a different statutory provision, 8 U.S.C. 1101(a)(43)(G), which defines an "aggravated felony," for purposes of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, to include certain offenses "for which the term of imprisonment [is] at least one year." While the statute in *Mutascu* provides that the relevant "term of imprisonment" is deemed to include the period of incarceration that was initially ordered, even if a portion of that period is suspended, see 8 U.S.C. 1101(a)(48)(B), that language merely indicates that, *at a minimum*, the relevant "term of imprisonment" is the term that was actually imposed. That statute, moreover, is the same statute that was at issue in *Corona-Sanchez*, in which the Ninth Circuit first held that recidivist enhancements to prior offenses may not be taken into account in determining the maximum sentence that could have been imposed. In *Mutascu*, the Fifth Circuit refused to "follow the reasoning" of *Corona-Sanchez*, 444 F.3d at 712; in the decision below, the Ninth Circuit held that it was bound by the "rationale" of *Corona-Sanchez*, Pet. App. 12a, and acknowledged that its decision was in tension with *Mutascu*, *id.* at 16a n.6. The Fifth Circuit has thus rejected the reasoning of the Ninth Circuit challenged here.

Respondent further contends (Br. in Opp. 9) that the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535 (2003), is not even in tension with the decision below. It is true that, in *Williams*, the Fourth Circuit concluded only that the defendant was not subject to the ACCA because the state prosecutor had not taken the procedural

2. Respondent additionally contends (Br. in Opp. 12-16) that the Ninth Circuit's decision was correct. Respondent's various merits arguments provide no reason for denying certiorari and are in any event unsound.

a. Respondent first asserts (Br. in Opp. 12) that the text of Section 924(e)(2)(A)(ii) supports the court of appeals' construction, because the "offense" for which respondent was convicted was delivery of a controlled substance *simpliciter* (not delivery of a controlled substance by a recidivist). Section 924(e)(2)(A)(ii), however, treats a prior drug offense as "serious" if the offense is one "for which a maximum term of imprisonment of ten years or more is prescribed by law." Because respondent was a recidivist, the "maximum term of imprisonment" for *his* offense was ten years, not the five years he would have received if he were a first-time offender. There is no textual basis for the conclusion that the "maximum term of imprisonment" is the lowest (or, for that matter, highest) maximum to which a hypothetical offender could have been subject, rather than the real maximum to which the defendant was actually subject.

b. Like the Ninth Circuit, respondent principally relies (Br. in Opp. 13-14) on *Taylor* v. *United States*, 495 U.S. 575 (1990), which in respondent's view stands for the proposition that courts should take "a 'formal cate-

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steps necessary to trigger an enhanced sentence for recidivism on one of the defendant's underlying predicate offenses. *Id.* at 538-539. As respondent seemingly recognizes, however, that conclusion strongly suggests that the Fourth Circuit believed that, where the necessary procedural steps *have* been taken, recidivist enhancements *should* be considered in determining the maximum sentence that could have been imposed. Indeed, in *Duval*, the First Circuit appears to have read *Williams* in precisely that manner. See 2007 WL 2253505, at *14. At a minimum, therefore, *Williams* is in tension with the decision below—as the Ninth Circuit recognized. See Pet. App. 16a n.6.

gorical approach' to determining whether a state conviction qualifies as an ACCA predicate offense under Section 924(e)." Br. in Opp. 13 (citation omitted). In *Taylor*, however, the Court held only that, in determining whether a particular statute proscribed generic "burglary" of the type that qualifies as an ACCA predicate offense, a court should look at the elements of the crime and not the facts of the conviction. 495 U.S. at 598, 600, 602. The considerations underlying *Taylor* do not justify extending it to this context. Determining whether a defendant was subject to a recidivist enhancement is a different (and easier) task than establishing the facts of the defendant's conduct, because a court need only consider court documents—such as the judgment or the sentencing transcript—in order to answer that question. Even under *Taylor*, a court may resort to judicial records (such as indictments and jury instructions) to determine whether a defendant was convicted of a generic offense. See *Shepard* v. *United States*, 544 U.S. 13, 16, 23 & n.4 (2005). And while respondent contends that whether a defendant was a recidivist is a "fact[ual]" question (Br. in Opp. 14 & n.6), respondent does not argue that resolution of that question would trigger "collateral trials" and "evidentiary disputes" of the type that *Taylor* sought to prevent. *Shepard*, 544 U.S. at 23 & n.4.

c. Respondent also relies (Br. in Opp. 15-16) on *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Those decisions, too, address a different question. Together, they stand only for the proposition that, whereas a fact that increases an otherwise-applicable maximum sentence must be submitted to the jury and proved beyond a reasonable doubt, the fact of a prior sentence-enhancing conviction need not. As a result, recidivism

need not be treated as an element of the offense for *constitutional* purposes. For ACCA purposes, however, the relevant question is not whether recidivism is an offense element; rather, the question is whether a recidivist enhancement should be ignored when the defendant was a recidivist. Respondent's position is that the "maximum term of imprisonment" should be deemed an artificial maximum to which a non-recidivist defendant would be exposed, rather than the real maximum that a recidivist defendant faces. Under respondent's position, a recidivist defendant would be credited with the unenhanced maximum for ACCA purposes, even if he actually received a qualifying ten-year sentence for his state offense. Neither *Almendarez-Torres* nor *Apprendi* requires that anomalous result.

d. Finally, notwithstanding his recognition that he has waived the underlying argument to the contrary, respondent contends (Br. in Opp. 15) that the government's interpretation is "internally inconsistent" because the government has argued that the relevant "maximum term of imprisonment" is the statutory maximum, rather than any lower guidelines maximum. There is no such inconsistency, however, because the conclusion that the relevant "maximum" is the statutory maximum rests on the premise that Congress enacted the ACCA in 1986, long before this Court's *Apprendi* line of cases, and on the premise that this Court has since defined the guidelines maximum as the statutory maximum only "for *Apprendi* purposes." *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004). Those premises, in turn, have no bearing on whether the "maximum term of imprisonment" is the real statutory maximum to which the defendant was actually subject, or the lowest statutory maximum to which a hypothetical first-time

offender *could* have been subject. As the courts of appeals to have addressed the issue have held (see Pet. 13 n.3), the former reading is the only one that is consistent with the statutory language.

3. The question presented in this case is an important one that warrants this Court's review. The Ninth Circuit has held that recidivist enhancements must be disregarded for purposes of determining whether an individual who has been convicted of possessing a firearm as a felon constitutes a career offender. The ACCA is an important tool in combating recidivist violent and drug-trafficking offenders, and this Court has frequently granted review to consider questions arising under that statute. See, *e.g.*, *Logan* v. *United States*, cert. granted, 127 S. Ct. 1251 (2007) (No. 06-6911); *James* v. *United States*, 127 S. Ct. 1586 (2007); *Shepard*, *supra*. It is a matter of common sense that many of the individuals who are potentially subject to the ACCA (because they have committed three prior offenses) would have been subject to recidivist enhancements for at least some of those prior offenses. And with regard to those individuals, the consequences of disregarding those recidivist enhancements may be dramatic: indeed, in this case, the 92-month sentence that respondent ultimately received was barely half the sentence that he would have received under the ACCA.

Nor are the consequences of the Ninth Circuit's approach limited to the ACCA context, as its earlier decision in *Corona-Sanchez* demonstrates. That decision construed the definition of "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), which not only affects a defendant's base offense level for immigration-related offenses, see Sentencing Guidelines § 2L1.2(b)(1)(C), but also has other conse-

quences under the immigration laws, see *Lopez* v. *Gonzales*, 127 S. Ct. 625, 628 (2006). And the Ninth Circuit has also applied the reasoning of *Corona-Sanchez* in other contexts, including to the question whether an offense constitutes a "felony punishable under the Controlled Substances Act" for purposes of the definition of "drug trafficking crime" in 18 U.S.C. 924(c)(2). See *United States* v. *Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002), cert. denied, 538 U.S. 915 (2003); but cf. *Lopez*, 127 S. Ct. at 630 n.6 (noting that state possession crimes that "correspond to * * * recidivist possession [under 21 U.S.C. 844(a)] * * * clearly fall within the definition[] used by Congress in * * * 18 U.S.C. § 924(c)(2)"). Because the statutes at issue in those cases (like the ACCA) are important (and, in the Ninth Circuit's view, are indistinguishable); because the Ninth Circuit has jurisdiction over a disproportionate share of the Nation's criminal and immigration cases; and because there is little prospect of the Ninth Circuit's receding from the approach it originally took in its en banc decision in *Corona-Sanchez* (particularly given its denial of en banc review here), this Court's review is plainly merited.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

AUGUST 2007

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58pgs (4)

No. 06-1646

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), provides a 15-year minimum sentence for a person convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), if the person has three prior convictions for, *inter alia*, state drug-trafficking offenses "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The question presented is as follows:

Whether a state drug-trafficking offense, for which the maximum term of imprisonment for repeat offenders was ten years, qualifies as a predicate offense for such offenders under 18 U.S.C. 924(e)(2)(A)(ii).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 255-271) is reported at 464 F.3d 1072. The sentencing order of the district court (J.A. 245-254) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. A petition for rehearing was denied on January 12, 2007 (J.A. 272-273). On March 29, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 12, 2007; on May 2, 2007, Justice Kennedy further extended the time to and including June 11, 2007. The petition was filed on that date and granted on September 25, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), is reprinted in an appendix to this brief. App., *infra*, 1a-2a. Relevant provisions of Washington law are reprinted at J.A. 274-286.

STATEMENT

This case presents a question of statutory interpretation involving the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. IV 2004), which was enacted to assist the States in addressing the threat to public safety posed by career criminals. *Taylor* v. *United States*, 495 U.S. 575, 581 (1990). As amended, the ACCA provides a 15-year minimum sentence for a person convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), if the person has three prior convictions for "violent felon[ies]" or "serious drug offense[s]." A "serious drug offense" is defined as, *inter alia*, a state drug-trafficking offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The question presented is whether a state drug-trafficking offense qualifies as a "serious drug offense" for repeat offenders where the maximum term of imprisonment for such offenders was ten years.

Following a jury trial, respondent was convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). At sentencing, the government sought application of the ACCA. Although the government introduced proof that respondent had two convictions in California for burglary and three convictions in Washington State for delivery of a controlled substance, the district court declined to apply the ACCA. The court reasoned that respondent's Washington convic-

tions did not qualify as convictions for "serious drug offense[s]" because the maximum term of imprisonment *for first-time offenders* was only five years. J.A. 245-254. The district court sentenced respondent to 92 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. J.A. 255-271.

1. In 1998, after serving time for various drug-trafficking convictions in Washington State, respondent was placed on a term of supervised release. Respondent subsequently absconded; he was convicted, *in absentia*, of escaping from custody, and warrants were issued for his arrest. On April 1, 2003, a fugitive task force located and arrested respondent at an apartment in Spokane, Washington, where he was apparently residing. During a subsequent search of the apartment, officers discovered a .40-caliber semi-automatic handgun and ammunition hidden beneath a couch. A friend of respondent's later testified that he had given respondent the gun so that respondent could "get rid" of it. Respondent admitted that he was aware that he was not supposed to possess a gun. Officers also found a bag of heroin and approximately $900 in cash on respondent's person, and more heroin, methamphetamine, and other drug paraphernalia in a room that respondent was apparently using as his bedroom. J.A. 256-258; Gov't C.A. Br. 5-12; PSR ¶ 89.

2. A grand jury in the Eastern District of Washington returned a one-count indictment charging respondent with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). J.A. 151-152. The indictment also cited the ACCA. J.A. 151. A jury found respondent guilty.

At sentencing, the government argued that, although respondent would ordinarily be subject to a maximum sentence of ten years of imprisonment for possessing a firearm as a convicted felon, see 18 U.S.C. 924(a)(2), respondent qualified as an armed career criminal under the ACCA (and was therefore subject to a minimum sentence of 15 years), see 18 U.S.C. 924(e)(1). As is relevant here, before his arrest in this case, respondent had two convictions for residential burglary under California law (in 1980 and 1982) and three convictions for delivery of a controlled substance under Washington law (all in 1995). J.A. 41-42, 247-250; PSR ¶¶ 42-44, 64-80, 84-86.[1]

For purposes of applying the ACCA (which requires three qualifying convictions for predicate offenses), the critical question was whether any of respondent's three convictions for delivery of a controlled substance under Washington law would qualify as a conviction for a "serious drug offense": *i.e.*, a state drug-trafficking offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).[2] Each of respondent's convictions was for the violation of a Washington statute that prohibits the manufacture, delivery, or possession of a controlled

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[1] Among other convictions, respondent also had a 1980 California conviction for grand theft, a 1984 California conviction for possession of fraudulent checks, a 1985 California conviction for assault with a deadly weapon, a 1986 California conviction for being under the influence of controlled substances, a 1991 Washington conviction for assault, and the 1998 Washington conviction for escape from custody. PSR ¶¶ 38-41, 45-63, 81-83, 87-89.

[2] Although those convictions were entered on the same date, they constitute discrete convictions for ACCA purposes, because they were for offenses "committed on occasions different from one another." 18 U.S.C. 924(e)(1); see J.A. 14, 40, 91.

substance with intent to manufacture or deliver. Pet. App. 10a; see Wash. Rev. Code § 69.50.401 (1994). In each case, respondent pleaded guilty to delivery of a controlled substance from "Schedule III-V." J.A. 14, 40, 91; see Wash. Rev. Code § 69.50.401(a)(1)(ii)-(iv) (1994).[3]

Under Washington law, the maximum sentence for the delivery of a Schedule III, IV, or V controlled substance is five years for first-time offenders. See Wash. Rev. Code § 69.50.401(a)(1)(ii)-(iv) (1994).[4] For repeat offenders, however, the maximum sentence for that offense is ten years, under a statute providing that the maximum sentence for "[a]ny person convicted of a second or subsequent [drug] offense" is double the maximum for a first-time offender. *Id.* § 69.50.408(a). For purposes of that statute, an offense is "considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under * * * any statute of the United States

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[3] The underlying conduct in each case involved heroin, which is a Schedule I narcotic under Washington law. See Wash. Rev. Code § 69.50.101(r)(1) (1994). If respondent had pleaded guilty to delivery of a Schedule I narcotic, he would have been subject to a statutory maximum sentence of at least ten years, regardless of whether he was a recidivist. See *id.* § 69.50.401(a)(1)(i). Respondent, however, pleaded guilty in each case only to the lesser charge of delivery of a controlled substance from "Schedule III-V." In each case, apparently as part of a plea agreement, the charging document was amended to delete any reference to "heroin." Compare J.A. 34, 62-64, 112, with J.A. 33, 59-60, 110.

[4] The statute has since been amended to clarify that, for first-time offenders, delivery of a Schedule III, IV, or V controlled substance is a Class C felony—which, under Washington law, is punishable by a maximum sentence of five years. See Wash. Rev. Code §§ 9A.20.021(1)(c), 69.50.401(2)(c)-(e) (2004). In all other material respects, the relevant statutes remain the same.

or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs." *Id.* § 69.50.408(b). The judgments for each of respondent's convictions indicated that he was subject to a maximum sentence of ten years. J.A. 16, 42, 93; see PSR ¶¶ 51-53.

The federal presentence report (PSR) determined that respondent qualified as an armed career criminal under the ACCA, based on one of the two California convictions for residential burglary and the three Washington convictions for delivery of a controlled substance. PSR ¶¶ 33, 94, 120, 122. The PSR also determined that, based on a total offense level of 33 (increased because of the applicability of the ACCA, see United States Sentencing Guidelines § 4B1.4) and a criminal history category of VI, respondent's Guidelines sentencing range was 235 to 293 months of imprisonment. PSR ¶ 121.

At the sentencing hearing, the government contended that respondent qualified as an armed career criminal under the ACCA, based on both of the California burglary convictions and the three Washington drug-trafficking convictions. J.A. 160, 162-163.[5] Without objection, the government introduced certified copies of the judgments and other relevant documents pertaining to those convictions. J.A. 179-180; see J.A. 13-150.

3. The district court held that the ACCA was inapplicable. J.A. 245-254. As a preliminary matter, the court agreed with the government that both of respondent's California burglary convictions qualified as convictions for "burglar[ies]," and therefore "violent felon[ies]," under the ACCA. J.A. 247-249; see *Shepard* v. *United States*, 544 U.S. 13, 26 (2005); *Taylor*, 495 U.S. at

[5] The government did not become aware of respondent's 1980 California burglary conviction until after the presentence report was drafted. See J.A. 162-163.

602. Relying on the Ninth Circuit's decision in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), however, the district court held that the Washington drug-trafficking convictions did not qualify as convictions for "serious drug offense[s]," on the ground that the "maximum term of imprisonment" for those offenses had to be determined without reference to the sentencing provision applicable to repeat offenders. J.A. 250-254.

In *Corona-Sanchez*, the defendant had pleaded guilty to being found in the United States after deportation, in violation of 8 U.S.C. 1326(a). 291 F.3d at 1202. The question presented in that case was whether a California petty theft offense constituted an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, which would have increased the defendant's base offense level under Guidelines § 2L1.2(b)(1)(A). See *Corona-Sanchez*, 291 F.3d at 1202, 1203, 1208-1211. The answer to that question turned on whether the petty theft offense was "a theft offense * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G). While the maximum sentence for petty theft under California law was six months for first-time offenders, the defendant was sentenced to two years under a sentencing provision applicable to repeat offenders. *Corona-Sanchez*, 291 F.3d at 1208.

The Ninth Circuit held that, notwithstanding the fact that the defendant actually received a two-year sentence, the "term of imprisonment" for purposes of the INA's definition of "aggravated felony" (and thus the applicable Guideline) was six months, the maximum term that the defendant could have received if he were a first-time offender. *Corona-Sanchez*, 291 F.3d at

1208-1209. The court of appeals reasoned that, under *Taylor*, sentencing courts were required to "examine the prior crimes by considering the statutory definition of the crimes categorically, without reference to the particular facts underlying those convictions." *Ibid.* (internal quotation marks and citation omitted). The court of appeals therefore concluded that it was obligated to "consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209. The court of appeals added that its approach was "consistent with the Supreme Court's historic separation of recidivism and substantive crimes." *Ibid.* (citing *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)).[6]

Applying the reasoning of *Corona-Sanchez* in the ACCA context, the district court determined that respondent's drug-trafficking offenses did not constitute "serious drug offense[s]" because the maximum term of imprisonment for first-time offenders was only five years, not ten years or more. J.A. 253. While recognizing that the sentencing provision applicable to repeat offenders "automatically double[d] the statutory maximum sentence" for such offenders, the court refused to consider that provision in deciding the relevant "maximum term of imprisonment," on the ground that "recidivism does

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[6] Judge Rymer, joined by three other judges, dissented in relevant part, reasoning that "the determinative sentence [under the INA] is the *actual sentence imposed*," and that, "if the statutory maximum is what matters," the relevant statutory maximum was the maximum for repeat offenders. *Corona-Sanchez*, 291 F.3d at 1217-1218. Judge Kozinski also dissented, reasoning that the relevant "offense" was "the distinct crime of theft by one who has previously been convicted of a predicate offense." *Id.* at 1219.

not relate to the commission of the offense." *Id.* at 253-254 (citation omitted). The district court therefore concluded that, because respondent's only qualifying predicate convictions were his two California burglary convictions, the ACCA was inapplicable. *Id.* at 254.

The district court determined that, based on a total offense level of 24 (reduced mostly because of the inapplicability of the ACCA) and a criminal history category of V, respondent's Guidelines sentencing range was 92 to 115 months of imprisonment. J.A. 241. The court sentenced respondent to 92 months of imprisonment, to be followed by three years of supervised release. J.A. 230, 232.

4. The court of appeals affirmed. J.A. 255-271. On appeal, respondent did not contest that his two California burglary convictions constituted qualifying predicate convictions, see J.A. 265 n.2, nor that he was subject to the higher sentence for repeat offenders on each of his three Washington drug-trafficking convictions, see Resp. C.A. Cross-Appellee Br. 4-12. As is relevant here, the court of appeals upheld the district court's decision not to apply the ACCA. J.A. 264-270.[7] The court of appeals held that "[t]he district court correctly applied our decision in *Corona-Sanchez*, concluding that it could consider only the five-year maximum penalty provided in the statute of conviction." J.A. 264-265. The court of appeals explained that "[t]he rationale articulated in *Corona-Sanchez* applies equally in this case," J.A. 266, and added that "[t]his rationale applies regardless of

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[7] Respondent also appealed his conviction, contending that the district court should have suppressed evidence from the search of the residence and that the evidence was insufficient to support his conviction. The court of appeals rejected respondent's contentions and affirmed the conviction. J.A. 259-264.

where the recidivist provision is located in the statutory framework," J.A. 267. Notwithstanding the fact that respondent had been subject to a ten-year maximum term as a repeat offender, therefore, the court of appeals held that "the district court properly concluded that it could consider only the five-year maximum penalty" provided for first-time offenders. J.A. 270.

SUMMARY OF ARGUMENT

A. The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), defines a "serious drug offense" as, *inter alia*, "an offense under State law" involving drug trafficking "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). For purposes of the ACCA, the relevant "maximum term of imprisonment" for a repeat offender is the maximum sentence prescribed by law for recidivists. As this Court has repeatedly noted, a recidivist enhancement constitutes a heightened penalty *for the underlying offense.* The ACCA, which is itself designed to impose more significant penalties on certain recidivists, is logically understood to recognize that a defendant's prior crimes may be more serious—*i.e.*, may have carried a higher sentence under state law—because the defendant was already a recidivist. Thus, a prior offense may have one maximum sentence for a first-time offender, but a higher one for a repeat offender. That is precisely what the Washington drug-trafficking statutes at issue in this case do. Those statutes prescribe maximum terms of imprisonment of five years for first-time offenders, but ten years for repeat offenders. Because respondent was a repeat offender subject to a ten-year maximum sentence on each of his convictions for drug-trafficking of-

fenses, his offenses constitute "serious drug offense[s]" for purposes of the ACCA.

Interpreting the ACCA to refer to the maximum term for recidivists when the defendant was a repeat offender avoids the anomalies that would result from interpreting the ACCA to point to only one maximum term, no matter what the status of the defendant or the actual maximum punishment provided by state law for that defendant. If the sole maximum term were the unenhanced term, repeat offenders whose prior sentencing exposure met the ten-year threshold would be equated with first-time offenders whose prior sentencing exposure did not. If the sole maximum term were the recidivist-enhanced term, all defendants would be subject to the higher statutory maximum term even if they were first-time offenders. It is difficult to impute to Congress an intention to have required either of those results. Rather, it is both more logical and more equitable to interpret the ACCA as acknowledging that, in States with higher maximum penalties for recidivists, first-time offenders have one "maximum term of imprisonment" while repeat offenders have another.

B. The court of appeals held that the "maximum term of imprisonment" for respondent's Washington drug-trafficking offenses was the maximum sentence to which a hypothetical first-time offender would have been subject. That interpretation, however, not only is inconsistent with the text of the ACCA, but would produce paradoxical results. It would lead to cases in which the "maximum term of imprisonment" for a repeat offender would be lower than the term of imprisonment that the offender actually received. A statute aimed at incapacitating and punishing serious serial offenders would not likely be intended to operate in such a fashion.

This Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990), provides no support for the court of appeals' interpretation, because it deals with the discrete issue of whether a state-law offense is the type of offense that could serve as an ACCA predicate. Even under an approach analogous to the approach taken in *Taylor*, however, a sentencing court would be free to consider judicial records of convictions in determining whether a conviction qualifies under the ACCA. Use of such judicial records to determine the "maximum term of imprisonment" to which a defendant, as a recidivist, was exposed is thus fully consistent with *Taylor*. This Court's decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), are also unavailing, because, as relevant here, they stand only for the proposition that, as a matter of constitutional law, recidivism need not be treated as an offense element. A necessary corollary of that proposition is that recidivism *can* raise the maximum sentence for an offense.

C. Respondent does not directly argue that, for purposes of the ACCA, the relevant "maximum term of imprisonment" for each of his convictions is the maximum sentence to which he was subject under Washington's then-existing mandatory sentencing guidelines scheme. Such an argument would in any event lack merit. While the text of the ACCA accommodates the possibility of alternative "maximum term[s] of imprisonment" for recidivists and non-recidivists, it does not contemplate a different "maximum term of imprisonment" for *every* offender based on a host of case-specific guidelines factors. Legislating in 1986, long before *Blakely* v. *Washington*, 542 U.S. 296 (2004), Congress spoke only of "a maximum term of imprisonment * * * prescribed by

law" for the offense, and that language in no way suggests that Congress had in mind the guidelines maximum particular to a given offender.

D. The court of appeals' interpretation of the phrase "maximum term of imprisonment" is inconsistent not only with the ACCA's text, but also with its underlying objectives. It would eliminate a significant category of predicate offenses from the ACCA's scope: *i.e.*, state-law (or federal) offenses committed by repeat offenders who were subject to ten-year maximum sentences solely because of their recidivist status. And it would potentially affect the interpretation of similarly worded provisions that attach consequences to the fact of a prior conviction for an offense punishable by imprisonment of a certain term. No sound basis justifies the court of appeals' reading, and its decision should accordingly be reversed.

ARGUMENT

RESPONDENT'S DRUG-TRAFFICKING OFFENSES QUALIFIED AS "SERIOUS DRUG OFFENSE[S]" UNDER THE ARMED CAREER CRIMINAL ACT OF 1984 BECAUSE, AS A RECIDIVIST, HE WAS EXPOSED TO A "MAXIMUM TERM OF IMPRISONMENT" OF TEN YEARS

Under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), a person convicted of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), is subject to a 15-year minimum sentence if the person has three prior convictions for "violent felon[ies]" or "serious drug offense[s]." A "serious drug offense" is defined as, *inter alia*, "an offense under State law" involving drug trafficking "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The

court of appeals erred in this case by holding that the relevant "maximum term of imprisonment" for the drug-trafficking offenses of which respondent was convicted was the maximum sentence to which a hypothetical first-time offender would have been subject, rather than the maximum sentence for repeat offenders that respondent actually faced. That holding cannot be squared with the text of the ACCA, or with this Court's decisions construing other language in the ACCA and similar language in other statutes.

A. Where State Law Prescribes Alternative Maximum Sentences Of Imprisonment For First-Time And Repeat Offenders, The Relevant "Maximum Term Of Imprisonment" For A Defendant Who Was A Recidivist Is The Maximum Sentence Prescribed For Repeat Offenders

There is no dispute in this case that, as a repeat offender, respondent was subject to a maximum term of imprisonment of ten years on each of his three convictions under Washington law for delivery of a Schedule III, IV, or V controlled substance. See Wash. Rev. Code §§ 69.50.401(a)(1)(ii)-(iv), 69.50.408(a) (1994). The only question is whether that maximum term of imprisonment is the relevant "maximum term of imprisonment" for purposes of the ACCA. The court of appeals e red by holding that it was not.

1. The provision of the ACCA at issue, 18 U.S.C. 924(e)(2)(A)(ii), defines a "serious drug offense" as, *inter alia*, "an offense under State law" involving drug trafficking "for which a maximum term of imprisonment of ten years or more is prescribed by law." As a threshold matter, the relevant "offense under State law" in this case is delivery of a Schedule III, IV, or V controlled substance, without regard to the offender's recidivist

status. As this Court has frequently noted, "[t]he definition of the elements of a criminal offense is entrusted to the legislature," particularly where the offense at issue is a "creature[] of statute." *Liparota* v. *United States*, 471 U.S. 419, 424 (1985). Although a legislature may treat recidivism as an offense element—as Congress did with regard to the offense of which respondent was convicted here, see 18 U.S.C. 922(g)(1) (treating the fact of a prior felony conviction as an element of the offense of possessing a firearm as a convicted felon)—recidivism is typically not an offense element when "the [underlying] conduct, in the absence of the recidivism, is *independently* unlawful." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 230 (1998) (emphasis added).

Recidivism is not an element of the Washington drug-trafficking offense of which respondent was convicted. The relevant statute provides that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." Wash. Rev. Code § 69.50.401(a) (1994). The statute proceeds to establish different penalties depending on the type of controlled substance involved in the offense. *Id.* § 69.50.401(a)(1)(i)-(iv). Consistent with this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court of Washington has held that the type of controlled substance is an offense element that must be submitted to the jury and proven beyond a reasonable doubt. See *State* v. *Goodman*, 83 P.3d 410, 415-416 (2004). Consistent with *Almendarez-Torres*, however, the Washington courts have not construed recidivism as an element of the drug-trafficking offense established by Section 69.50.401(a), and there is no basis here for departing from the general practice of treating recidivism as a sentencing factor.

Instead, the logical reading of the relevant state statutes is that they establish *alternative* maximum terms of imprisonment for the offense of delivery of a Schedule III, IV, or V controlled substance for two categories of offenders: *i.e.*, first-time offenders and repeat offenders. For first-time offenders, the maximum term of imprisonment is five years, see Wash. Rev. Code § 69.50.401(a)(ii)-(iv) (2004); for repeat offenders, the maximum term of imprisonment is doubled to ten years, see *id.* § 69.50.408(a). In respondent's case, it is the latter statute, and not the former, that "prescribe[d] [the] punishment for [his] offense." *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1218 (2002) (en banc) (Rymer, J., concurring in part and dissenting in part). Interpreting those statutes as establishing alternative maximum terms of imprisonment for the underlying offense is consistent with this Court's longstanding view that a recidivist enhancement constitutes a "stiffened penalty for the latest crime," *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948), rather than an additional penalty for the prior crime, see *Nichols* v. *United States*, 511 U.S. 738, 747 (1994).

2. In concluding that the applicable "maximum term of imprisonment" for the offense at issue here was the maximum term of imprisonment for first-time offenders, the court of appeals seemingly assumed that, under the ACCA, there can be only one "maximum term of imprisonment" for any given offense. See J.A. 266 (concluding that "the district court could consider only the maximum penalty as provided in the five-year statute of conviction, and not the maximum ten-year penalty resulting from the recidivism provision"). The text of the ACCA, however, belies the court of appeals' apparent premise. The ACCA does not define a "serious drug offense" as "an offense under State law * * * for which *the* maximum

term of imprisonment prescribed by law is ten years or more"; instead, it defines a "serious drug offense" as "an offense under State law * * * for which *a* maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added). That language naturally accommodates the possibility that, for any given offense, the relevant statute may establish alternative maximum terms of imprisonment for recidivists and non-recidivists.

It is unsurprising, moreover, that Congress accommodated that possibility in the ACCA. After all, the ACCA is itself a statute that imposes stiffer penalties on certain recidivists, and it would be incongruous for Congress to ignore the possibility that prior offenses might have been deemed more serious (as measured by the applicable penalty) precisely because the defendant was at that time a repeat offender. Enhanced penalties for recidivists are a familiar and ubiquitous feature of the criminal justice system. See *Parke* v. *Raley*, 506 U.S. 20, 26-27 (1992) (noting that all 50 States and the federal government provide for recidivist enhancements). Congress had every reason to take such enhanced penalties into account in determining a defendant's maximum sentencing exposure on his prior offenses—and it is hard to imagine that Congress would have wanted to ignore state judgments that certain offenses were more serious when committed by repeat offenders.

This Court's decision in *United States* v. *LaBonte*, 520 U.S. 751 (1997), confirms that a statute may establish alternative maximum terms of imprisonment for recidivist and non-recidivists who commit a single offense—and that, for purposes of a federal statute referring to a "maximum" term, the relevant maximum may be the maximum for repeat offenders. In *LaBonte*, the

Court considered the meaning of a statute that directed the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants" who were career offenders. 28 U.S.C. 994(h). The Commission promulgated a guideline for career offenders and stated in the commentary that the "offense statutory maximum" was "the maximum term of imprisonment authorized for the offense of conviction * * *, not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." Guidelines § 4B1.1, comment. (n.2) (1995).

The Court held that the commentary to the guideline was inconsistent with the statute. *LaBonte*, 520 U.S. at 757-762. At the outset, the Court "assume[d] that in drafting this legislation, Congress said what it meant." *Id.* at 757. The Court noted that "the phrase 'maximum term authorized' should be construed as requiring the 'highest' or 'greatest' sentence allowed by statute." *Id.* at 758. The Court proceeded to reject the argument that the phrase "maximum term authorized" "refers only to the highest penalty authorized by the offense of conviction, excluding any statutory sentencing enhancements." *Ibid.* Citing 21 U.S.C. 841, which establishes a maximum term of imprisonment for certain drug-trafficking offenses of 20 years for first-time offenders but 30 years for repeat offenders, the Court reasoned that, "[w]here Congress has enacted a base penalty for first-time offenders * * * and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offenders is the enhanced, not the base, term." *LaBonte*, 520 U.S. at 759.

As respondent notes (Br. in Opp. 13 n.5), the statute at issue in *LaBonte* refers to "the maximum term [of imprisonment] authorized for [certain] *categories of defendants*" (*i.e.*, career offenders), 28 U.S.C. 994(h) (emphasis added), whereas the ACCA refers to "a maximum term of imprisonment" *for the offense*, 18 U.S.C. 924(e)(2)(A)(ii). The critical lesson of *LaBonte*, however, is that a statute can be said to establish alternative "maximum" terms of imprisonment for a single offense, and that the relevant "maximum" term may depend on whether the defendant is a first-time or repeat offender. The reasoning of *LaBonte* thus supports the conclusion that, under the ACCA, the "maximum term of imprisonment" for a recidivist is the maximum to which he was actually subject as a repeat offender.

3. The court of appeals' apparent assumption that, under the ACCA, only one "maximum term of imprisonment" exists for any given offense would, if true, appear to lead to an anomaly that it is difficult to believe Congress would have intended. If there are two maximum penalties for a single offense (*e.g.*, five years for first-time offenders and ten years for repeat offenders), but the ACCA must identify a *single* maximum penalty prescribed by law for the offense, then it is hard to escape the conclusion that the true maximum penalty is the higher of the two. It would be literally true that the maximum penalty for the offense is ten years, even if a first-time offender could not receive a sentence longer than five years. That seems like an anomalous and unduly harsh result. But the alternative construction, under which a repeat offender who faces the possibility of a valid ten-year sentence would be treated as if he faced a maximum sentence of five years, is at least as anomalous and difficult to square with the statute. It would

make little sense to treat repeat offenders as having faced a "maximum" term that was *lower* than the term for which they were eligible.

Congress need not be deemed to have adopted either of those extreme alternatives. The language of the ACCA accommodates the possibility of alternative "maximum term[s] of imprisonment" for first-time and repeat offenders. Given the universal practice of enhancing sentences for recidivism and the ease of making findings concerning recidivist status, determining the maximum sentence for a recidivist by reference to that status is consistent with congressional intent. Because respondent was a repeat offender subject to a "maximum term of imprisonment" of ten years on each of his convictions for Washington drug-trafficking offenses, those offenses were "serious drug offense[s]" for purposes of the ACCA.

B. The Court Of Appeals Erred By Holding That The "Maximum Term Of Imprisonment" For The Offense For A Recidivist Is The Maximum Sentence To Which He Would Have Been Subject As A Non-Recidivist

The court of appeals held that the "maximum term of imprisonment" for respondent's Washington drug-trafficking offenses was the maximum term of imprisonment to which a hypothetical first-time offender would have been subject. J.A. 270. That interpretation cannot be reconciled with the ACCA's text, as discussed above. See pp. 14-20, *supra*. It would also produce highly anomalous results, with a defendant potentially serving a longer sentence than the one "prescribed by law" for purposes of ACCA. If there is only one maximum sentence for the offense that respondent committed, it is hard to escape the conclusion that it was the ten-year

maximum that respondent actually faced. No decision of this Court justifies the countertextual and incongruous consequences of the court of appeals' (and respondent's) approach.

1. The court of appeals' interpretation leads to the bizarre result that, for a repeat offender, the "maximum term of imprisonment" for his prior offense would sometimes be lower than the term of imprisonment that he actually received. This case does not present that precise anomaly, because, while respondent was subject to a ten-year maximum sentence on each of his Washington drug-trafficking convictions, he was actually sentenced to concurrent terms of 48 months of imprisonment on each conviction—less than the five-year maximum sentence for first-time offenders that would serve as the "maximum term of imprisonment" under the court of appeals' interpretation, much less the ten-year maximum that respondent actually (and undisputedly) faced. See J.A. 21, 47, 98.

The Ninth Circuit's earlier decision in *Corona-Sanchez*, however, illustrates the problem in its starkest form. That case involved the definition of "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, which includes "a theft offense * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G). In *Corona-Sanchez*, the defendant had been sentenced to two years of imprisonment for petty theft under California law, under a sentencing provision applicable to repeat offenders. 291 F.3d at 1208. Applying the approach that it would later follow in this case, however, the court of appeals held that the relevant maximum "term of imprisonment" for purposes of the INA was six months, notwithstanding the fact that the defendant's *actual* term of impris-

onment was two years, because six months was the maximum term of imprisonment for petty theft under California law for first-time offenders. *Id.* at 1208-1209.

It could perhaps be argued that, in *Corona-Sanchez*, only six months of the defendant's sentence was attributable to his "offense," and the remainder was attributable to his recidivism. Such an argument, however, would be irreconcilable with this Court's cases, which make clear that a recidivist enhancement constitutes a "stiffened penalty" *for the underlying offense*. *E.g.*, *Gryger*, 334 U.S. at 732. Indeed, if the defendant were being punished for his prior offense as such, the additional penalty would violate the Double Jeopardy Clause—an implication that *Gryger* recognized and rejected. *Ibid.* The practical consequence of such an argument, moreover, would be to leave the recidivist enhancement in a kind of legal limbo, at least for purposes of the ACCA, because that enhancement would constitute neither an element of the underlying offense nor a component of the term of imprisonment for that offense. A more natural understanding is that the recidivist enhancement is part of the punishment for the underlying offense. For a repeat offender, therefore, the "maximum term of imprisonment" for a given offense must be the highest sentence that the offender *could* have received—and, *a fortiori*, at least as high as the sentence that the offender *actually* received.[8]

2. Like the court of appeals in *Corona-Sanchez*, respondent principally relies (Br. in Opp. 13-14) on this

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[8] The determination whether a prior conviction qualifies under the ACCA unambiguously turns on the *potential* sentence prescribed by law for the offense. By contrast, in calculating a defendant's criminal history, the Guidelines take into account the *actual* sentence received by the defendant. See Guidelines §§ 4A1.1, 4A1.2(b)(1).

Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990). That decision, however, is inapposite and provides no support for the court of appeals' interpretation.

In *Taylor*, this Court considered whether a state-law conviction qualified as a conviction for "burglary," one of the enumerated types of "violent felon[ies]" under the ACCA. The Court first held that, by referring to "burglary" in the ACCA, Congress did not intend to reach "whatever the State of the defendant's prior conviction defines as burglary," but instead "intended that some uniform definition of burglary be applied to all cases in which the Government seeks a[n] [ACCA] enhancement." 495 U.S. at 580. The Court then held that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States": *i.e.*, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598. The Court concluded that, in determining whether a state-law conviction for burglary qualified as a conviction for "burglary" in that generic sense, a sentencing court should generally "look[] only to the statutory definition[] of the prior offense[], and not to the particular facts underlying th[at] conviction[]." *Id.* at 600.

Unlike *Taylor*, this case does not concern the threshold question of whether a state-law offense is the type of substantive offense that could serve as an ACCA predicate: respondent's convictions clearly were for "an offense under State law[] involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," as the definition of "serious drug offense" in the ACCA requires. 18 U.S.C. 924(e)(2)(A)(ii). Instead, this case involves the distinct question of how to define the relevant "maximum term

of imprisonment" for such an offense. *Taylor* does not speak to that question; the notion of a "categorical" approach to a maximum sentence makes little sense; and the ACCA's text accommodates the possibility of multiple maximum terms of imprisonment for a single offense. A "categorical" approach thus provides no reason for ignoring recidivist enhancements.

In any event, even if *Taylor* had relevance here, a sentencing court would still be permitted to consider a defendant's recidivist status in order to determine the "maximum term of imprisonment" to which he was actually exposed. In *Taylor*, this Court did not hold that, where a State defined the offense of burglary more broadly than the generic offense (*e.g.*, by including places other than buildings), a conviction for that offense could *never* qualify as a conviction for "burglary" under the ACCA. Instead, the Court adopted a "modified" categorical approach, under which, where a defendant was convicted of a broader state-law burglary offense, "a sentencing court [may] go beyond the mere fact of conviction" to determine whether "[the] jury was actually required to find all the elements of generic burglary." *Taylor*, 495 U.S. at 602. Thus, where a state statute permitted a defendant to be convicted of burglary for stealing from a place other than a building, the government could still use that conviction for purposes of the ACCA if it could show, from the charging document and the jury instructions, that the defendant was actually convicted of stealing from a building (and thus that the defendant had committed burglary in the generic sense). *Ibid.* In *Shepard* v. *United States*, 544 U.S. 13 (2005), the Court extended that approach to the context of guilty pleas, holding that a sentencing court may consider "the terms of the charging document, the terms of

a plea agreement or transcript of [a plea] colloquy between judge and defendant * * *, or * * * some comparable judicial record," *id.* at 26, in determining whether the defendant actually pleaded guilty to, and was convicted of, generic burglary.

Just as a court can resort to judicial records under the "modified" categorical approach of *Taylor* and *Shepard* to determine whether a defendant was actually convicted of an ACCA predicate offense, so too could a court readily resort to judicial records in order to determine whether a defendant was actually subject to a higher "maximum term of imprisonment" as a repeat offender. In many cases, as was true here, it will be clear from the judgment of conviction that the defendant was subject to the maximum sentence for repeat offenders. See J.A. 16, 42, 93 (stating that the "[m]aximum term" of imprisonment for each conviction was "10 years"). In other cases, the transcript of the sentencing hearing will reflect that fact. And where a defendant pleaded guilty to the predicate offense, documents relating to the guilty plea (such as the plea agreement) may indicate that fact, just as they may indicate (for purposes of *Taylor*) whether the defendant pleaded guilty to an ACCA predicate offense.[9] All of those records are either identical or analogous to the types of judicial records whose consideration the Court sanctioned in *Taylor* and *Shepard*. Resorting to such judicial records to determine whether a defendant was exposed to a recidi-

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[9] Indeed, in this case, respondent expressly acknowledged in the plea statement for one of his convictions that "[t]he crime with which I am charged carries a maximum sentence of 10 years imprisonment." J.A. 28. In the plea statements for the other two convictions, the maximum sentence for the offense was omitted, apparently inadvertently. See J.A. 54, 105.

vist enhancement would therefore not trigger "collateral trials" and "evidentiary disputes" of the type that *Taylor* sought to prevent. *Shepard*, 544 U.S. at 23 & n.4.

Accordingly, "nothing in *Taylor* suggests" that a sentencing court is "require[d] * * * to separate the recidivist enhancement from the underlying offense" and thereby to ignore the fact that state law provides a higher maximum term of imprisonment for repeat offenders. *Corona-Sanchez*, 291 F.3d at 1217 (Rymer, J., concurring in part and dissenting in part). To the contrary, it is fully consistent with *Taylor* to permit sentencing courts to consider a defendant's recidivist status in determining the "maximum term of imprisonment" to which he was exposed.

3. Like the court of appeals in *Corona-Sanchez*, respondent also relies (Br. in Opp. 15-16) on this Court's decisions in *Almendarez-Torres* and *Apprendi*. Those decisions, however, similarly do not support the court of appeals' interpretation of the ACCA.

In *Almendarez-Torres*, the Court considered whether, in order to subject a defendant to a higher maximum sentence under the recidivist provision in 8 U.S.C. 1326(b)(2) (which applies to defendants who reenter the United States after deportation following conviction for an aggravated felony), the government must charge the fact of the earlier conviction in the indictment. The Court concluded, first, that Congress intended to treat recidivism in Section 1326(b)(2) as a sentencing factor, rather than an offense element, see *Almendarez-Torres*, 523 U.S. at 228-239, and second, that the Fifth Amendment did not *require* that recidivism be treated as an offense element (and therefore charged in the indictment), see *id.* at 239-247. In reaching the latter conclusion, the Court noted "[the] longstanding tradition" of

treating recidivism as "not relat[ing] to the commission of the offense," but "*go[ing] to the punishment only.*" *Id.* at 244. In *Apprendi*, the Court cited those statements from *Almendarez-Torres* in excluding recidivism from its otherwise categorical holding that, under the Fifth and Sixth Amendments, any fact that increases the otherwise-applicable statutory maximum sentence must be proven to the jury beyond a reasonable doubt. See 530 U.S. at 488.

Almendarez-Torres and *Apprendi* stand for the propositions that, as a matter of constitutional law, recidivism need not be treated as an offense element, and that a State may constitutionally choose to treat recidivism as a sentencing enhancement that a court can take into account without submission to the jury. Nothing in either opinion undermines the Court's longstanding view that, where a State treats recidivism as a sentencing enhancement rather than an offense element, the recidivist enhancement imposes a higher penalty *for the underlying offense.* See, *e.g.*, *Gryger*, 334 U.S. at 732. It necessarily follows that a repeat offender faces a greater "maximum term of imprisonment" for the offense than a first-time offender. *Almendarez-Torres* and *Apprendi* are therefore entirely consistent with the conclusion that, for purposes of the ACCA, the "maximum term of imprisonment" for a repeat offender is the maximum to which the defendant was actually subject as a recidivist—not the maximum sentence that would apply if the recidivist enhancement were disregarded.[10]

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[10] In the wake of this Court's decision in *Apprendi*, some members of the Court suggested that *Almendarez-Torres* should be overruled. See, *e.g.*, *Rangel-Reyes* v. *United States*, 126 S. Ct. 2873, 2874-2875 (2006) (Thomas, J., dissenting from denial of a writ of certiorari). As recently as last Term, however, the Court reaffirmed the holding of *Almen-*

C. The "Maximum Term Of Imprisonment" For An Offense Is Not The Maximum Sentence To Which A Particular Offender Was Subject Under A Mandatory State Sentencing Guidelines Scheme

Respondent does not directly argue that, for purposes of the ACCA, the relevant "maximum term of imprisonment" for each of his convictions is the maximum term to which he was subject under Washington's then-existing mandatory sentencing guidelines scheme: *i.e.*, 57 months of imprisonment. See J.A. 16, 42, 93. As respondent acknowledged in his brief in opposition (at 15 n.7), such an argument would be forfeited because respondent did not advance it in the courts below (and those courts accordingly did not consider it). To the extent that respondent instead argues (Br. in Opp. 15) that the government's interpretation is "internally inconsistent" because it recognizes statutory maximums for recidivists and non-recidivists as relevant "maximum

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darez-Torres, characterizing as "baseless" the argument that the fact of a prior conviction must be found by a jury. See *James* v. *United States*, 127 S. Ct. 1586, 1600 n.8 (2007). This case does not implicate the validity of *Almendarez-Torres*, because, even if *Almendarez-Torres* were overruled, it would not affect the interpretation of the ACCA. It is, after all, respondent who is attempting to draw support from *Almendarez-Torres*, and, if anything, overruling *Almendarez-Torres* would only strengthen the government's position here. If the Court were to hold that, where recidivism increases the otherwise-applicable statutory maximum penalty, it must be proved to the jury beyond a reasonable doubt, a State that wanted recidivism to be taken into account would be required to treat it as an offense element. Where a State did so, however, the relevant offense for ACCA purposes would be "drug trafficking by a recidivist," and the "maximum term of imprisonment" for that offense would necessarily be the maximum term to which a recidivist would be subject. See *Corona-Sanchez*, 291 F.3d at 1219 (Kozinski, J., dissenting).

term[s] of imprisonment," but not any lower guidelines maximum, such an argument lacks merit.

1. The text of the ACCA does not support the conclusion that the relevant "maximum term of imprisonment" is the maximum sentence to which a particular offender was subject under a mandatory state sentencing guidelines scheme. As is relevant here, the ACCA defines a "serious drug offense" as "an offense under State law * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). While that language accommodates the possibility of alternative "maximum term[s] of imprisonment" prescribed by statute for recidivists and non-recidivists, it does not contemplate a different "maximum term of imprisonment" for *every* offender, depending on the particular facts about the offender's conduct developed at sentencing to determine the offender's guidelines sentence.

In construing similar language in 18 U.S.C. 922(g)(1)—which proscribes possession of a firearm by a person who has been convicted of a "crime punishable by imprisonment for a term exceeding one year"—the courts of appeals that have considered the issue have held that the relevant term of imprisonment is "the statutory maximum sentence for the offense, not the maximum sentence available in the particular case under the sentencing guidelines," on the ground that Section 922(g)(1) refers to "a crime's *potential* punishment." *United States* v. *Murillo*, 422 F.3d 1152, 1154-1155 (9th Cir. 2005), cert. denied, 547 U.S. 119 (2006); accord *United States* v. *Harp*, 406 F.3d 242, 246-247 (4th Cir.), cert. denied, 546 U.S. 919 (2005). The same reasoning is applicable to the ACCA; indeed, the Ninth Circuit has held that such reasoning applies "a fortiori," on the

ground that the statutory phrase "prescribed by law" "would appear to point more to the statute" establishing the maximum sentence for the offense. *United States* v. *Parry*, 479 F.3d 722, 726 (9th Cir.), cert. denied, No. 07-5270 (Oct. 1, 2007). Those cases support the conclusion that the relevant "maximum term of imprisonment" under the ACCA is the maximum for the offense, taking into account the offender's recidivist status but not all of the variations possible under a guidelines sentencing scheme.

2. *Blakely* v. *Washington*, 542 U.S. 296 (2004), is not to the contrary. In *Blakely*, the Court invalidated Washington State's mandatory sentencing guidelines scheme (the same scheme under which respondent was sentenced), holding that the scheme was unconstitutional because it mandated a sentencing range, lower than the statutory maximum for the relevant offense, that the judge could lawfully exceed only by finding an additional fact. *Id.* at 303. In so holding, the Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Ibid.* (emphasis omitted). The Court, however, did not purport to define the concept of a "maximum term of imprisonment" for purposes of the ACCA (or any other statute, for that matter); instead, it merely defined the concept for purposes of *Apprendi*'s constitutional (and procedural) rule, under which a fact (other than recidivism) that increases the otherwise-applicable "statutory maximum" may not be found by a judge, but must be submitted to the jury. See 530 U.S. at 488. Indeed, the Court's clarification that it was describing the statutory maximum "for *Ap-*

prendi purposes" underscores that the Court was using the phrase only in a specialized sense.

Congress passed the ACCA in its current form in 1986, long before *Blakely*. It did not with great prescience use the phrase "maximum term of imprisonment for *Apprendi* purposes," nor did it intend the phrase "maximum term of imprisonment" to be interpreted in that specialized manner. And there is no evidence that Congress believed that determinations under guidelines systems would control the "maximum term of imprisonment * * * prescribed by law" to which a defendant was exposed. Indeed, when Congress had just two years earlier provided for the promulgation of federal sentencing guidelines, it understood that the determination of guidelines ranges would not alter the maximum terms of imprisonment to which defendants were subject, which were fixed by statute; instead, the Sentencing Commission was charged, within two years of the effective date of the initial set of Guidelines, to "recommend to the Congress that it raise or lower * * * the maximum penalties[] of those offenses for which such an adjustment appears appropriate." 28 U.S.C. 994(r). As this Court recognized in *Mistretta* v. *United States*, 488 U.S. 361 (1989), the Commission's authority to promulgate the Guidelines did not "vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime." *Id.* at 396. To the extent that Congress in 1986 considered the issue in passing a statute that contained the phrase "maximum term of imprisonment * * * prescribed by law," it is thus untenable to suggest that Congress regarded sentencing guidelines systems as "prescrib[ing] by law" maximum penalties. While Congress was aware of state experimentation with guidelines systems, see S. Rep.

No. 225, 98th Cong., 1st Sess. 61-62 (1983), nothing indicates that Congress (or, for that matter, the States in question) regarded their guidelines systems as altering legislatively prescribed maximum sentences.

By contrast, the universal and well-established practice of varying maximum sentences because a defendant is a recidivist formed the very basis of the ACCA itself. A defendant sentenced for a violation of 18 U.S.C. 922(g)(1) faces a maximum sentence of ten years, see 18 U.S.C. 924(a)(2)—unless that defendant meets the recidivism criteria of the ACCA. Congress also was no doubt aware that statutes that impose higher maximum terms of imprisonment for recidivist defendants have a long pedigree and wide application in the States. See *Parke*, 506 U.S. at 26-27; *Oyler* v. *Boles*, 368 U.S. 448, 452 (1962); *Graham* v. *West Virginia*, 224 U.S. 616, 624 (1912); cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives * * * know the law."). It is thus entirely logical to attribute to Congress the intention to respect, as the "maximum term of imprisonment * * * prescribed by law" for an ACCA predicate offense, the enhanced sentences provided for repeat offenders. No similar basis exists for imputing to Congress the intent to refer to individually varying sentences based on myriad factual determinations under federal or state guidelines systems.[11]

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[11] Resort to guidelines determinations as the determinant of maximum terms of imprisonment would also, at least before *Blakely*, have created a host of practical problems. Guidelines factors were typically not determined until the time of sentencing and would not always be ascertainable from readily available judicial documents long after the fact of sentencing in those cases. In addition, even when judges made determinations that are now understood to raise a "maximum" sentence

3. This Court's decision in *United States* v. *R.L.C.*, 503 U.S. 291 (1992), does not support the contrary conclusion, *i.e.*, that a defendant's "maximum" sentencing exposure for ACCA purposes must be determined by reference to state guidelines systems. That case involved a statute providing that the term of detention for a juvenile delinquent in the federal system may not exceed, *inter alia*, "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." 18 U.S.C. 5037(c)(1)(B) and (2)(B)(ii) (1988). The Court held that, under that statute, the relevant "maximum term of imprisonment" was "the maximum length of sentence to which a similarly situated adult would be subject if convicted of the adult counterpart of the offense and sentenced under the statute requiring application of the Guidelines." *R.L.C.*, 503 U.S. at 306. In adopting the Guidelines maximum as the relevant "maximum," the Court reasoned that the language of the statute was ambiguous, *id.* at 297-298, but

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for *Blakely* purposes, judges typically were not *obligated* to increase sentences as a result. See, *e.g.*, *Blakely*, 542 U.S. at 305 n.8. A judge that exercised discretion not to enhance a sentence based on an aggravating factor under a state guidelines system may not have memorialized his finding of the aggravating factor or the ensuing consequences for the "maximum" sentence. Congress cannot have intended to require federal sentencing courts administering the ACCA to wade into a quagmire of such case-by-case assessments in order to decide whether a prior offense qualified for federal sentence enhancement. Cf. *Taylor*, 495 U.S. at 601 (noting the "daunting" "practical problems" that would result from a fact-based approach to determining whether a conviction qualifies, and concluding that, "[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history").

that its construction was supported by the rule of lenity, *id.* at 305-306; *id.* at 307-311 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 312 (Thomas, J., concurring in part and concurring in the judgment). Four Justices concluded that the Court's conclusion was also supported by the legislative history. *Id.* at 298-305 (plurality opinion).[12]

The statute in *R.L.C.*, however, significantly differed from the statute at issue here, because, it expressly contemplated an offender-specific maximum sentence: *viz.*, the maximum sentence to which the *particular juvenile* would have been subject if he had been sentenced as an adult. The statute at issue here, by contrast, refers to "a maximum term of imprisonment" for the underlying *offense*, which, for the reasons described, cannot have been intended to subsume myriad guidelines determinations. Relatedly, the statute in *R.L.C.* dealt with punishments within the federal system and directed an offender-specific inquiry into the sentence that would have been imposed in that system. Here, by contrast, the ACCA seeks to make a federal sentence turn on offenses from all 50 States, and it would be far more surprising for Congress to have intended to incorporate all of the intricacies of those States' sentencing systems.

Moreover, as the plurality in *R.L.C.* noted, a contrary reading of the statute in *R.L.C.* would have meant that a sentencing court could have imposed a more severe sentence on a juvenile offender than would have been

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[12] The statute in *R.L.C.* has since been amended and now expressly provides that a juvenile's term of detention may not exceed, *inter alia*, "the maximum of the guideline range * * * applicable to an otherwise similarly situated adult defendant," unless the sentencing court finds an aggravating factor warranting an upward departure. 18 U.S.C. 5037(c)(1)(B), (2)(A)(ii) and (2)(B)(ii) (Supp. V 2005).

permitted for an adult offender under the then-mandatory federal Guidelines. See 503 U.S. at 305. Here, no anomaly results from excluding consideration of a prior offender's guidelines score when determining the "maximum term of imprisonment * * * prescribed by law." Indeed, the anomaly would be to exclude from sentence enhancement under the ACCA all but those defendants whose documented sentencing guidelines range met the ten-year threshold—even though the relevant state statutes provided a ten-year or greater penalty for the offense. Finally, no legislative history supports referring to a guidelines system to identify an ACCA offender's maximum sentence for a prior crime. Against that background, *R.L.C.* has no application here.

D. If Adopted By This Court, The Court Of Appeals' Interpretation Will Have Adverse Consequences For The Application Of ACCA And Other Statutes

The court of appeals' interpretation of the phrase "maximum term of imprisonment"—under which the "maximum term of imprisonment" for the offense for a repeat offender is the maximum sentence to which he would have been subject as a first-time offender—is inconsistent not only with the ACCA's text, but also with its underlying policy objectives. The ACCA was "designed to increase the participation of the Federal law enforcement system in efforts to curb armed, habitual drug traffickers and violent criminals." H.R. Rep. No. 849, 99th Cong., 2d Sess. 1 (1986). The court of appeals' interpretation, however, would exclude from the ACCA's scope recidivists who were indisputably subject to ten-year maximum sentences as repeat offenders for prior drug offenses under state laws, such as Washington's, that provide for lower maximum sentences for first-time

offenders.[13] It would also exclude from the ACCA's scope recidivists who were subject to similar ten-year maximum sentences as repeat offenders for prior drug offenses under *federal* law, insofar as the portion of the definition of "serious drug offense" that relates to prior federal offenses contains the same "maximum term of imprisonment" language as the portion of the definition that relates to prior state-law offenses. Compare 18 U.S.C. 924(e)(2)(A)(i), with 18 U.S.C. 924(e)(2)(A)(ii).[14] As the facts of this case amply demonstrate, the consequences of excluding those offenders from the ACCA's scope are potentially dramatic: here, respondent received only a 92-month sentence, barely half the *minimum* sentence that he would have received under the ACCA.

More broadly, the court of appeals' interpretation, if adopted by this Court, could have ramifications for the interpretation of other statutes in a range of different contexts. Numerous federal statutes impose more severe sanctions on individuals who have been convicted of "crimes punishable by imprisonment" for more than a specified term of years. Those statutes include the ACCA itself, 18 U.S.C. 924(e)(2)(B) (which defines a

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[13] In addition to Washington, at least 27 States have statutes defining drug-trafficking offenses with maximum sentences of less than ten years for first-time offenders, but ten years or more for repeat offenders. See App., *infra*, 3a-13a.

[14] While many provisions of the federal drug laws impose maximum sentences of ten years or more on first-time and repeat offenders alike, see, *e.g.*, 21 U.S.C. 841(b)(1)(A), (B) and (C), others, like the Washington statutes at issue here, impose a maximum sentence of ten years or more only on recidivists. See 21 U.S.C. 841(b)(1)(D) (imposing maximum sentence of five years for first-time offenders, but ten years for repeat offenders, for trafficking, *inter alia*, less than 50 kilograms of marijuana or less than 10 kilograms of hashish).

qualifying "violent felony" as a "crime punishable by imprisonment for a term exceeding one year"); the statute under which respondent was convicted here, 18 U.S.C. 922(g)(1) (which prohibits possession of a firearm by a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year"); and the Controlled Substances Act, 21 U.S.C. 802(44) (which defines a "felony drug offense" as a drug offense "that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country"). Because the language in those statutes cannot meaningfully be distinguished from the language at issue here, the court of appeals' interpretation would seemingly narrow the scope of those statutes as well.

For the reasons stated above, there is no basis for adopting the court of appeals' cramped interpretation. The text of the ACCA, as well as common sense, dictates the conclusion that the "maximum term of imprisonment" for a recidivist is the maximum term to which he was actually subject as a repeat offender. The court of appeals therefore erred by holding that respondent was not subject to an enhanced sentence under the ACCA.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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NOVEMBER 2007

APPENDIX A

1. Section 924(e) of Title 18 of the United States Code (2000 & Supp. IV 2004), provides:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

APPENDIX B

STATE-LAW SERIOUS DRUG OFFENSES PUNISHABLE BY A MAXIMUM TERM OF IMPRISONMENT OF TEN YEARS OR MORE FOR RECIDIVISTS

Colorado: Colo. Rev. Stat. Ann. § 18-18-405(2)(a)(II)(A) (West 2006) (unlawful manufacturing, dispensing, selling, distributing, possessing or possessing with the intent to manufacture, dispense, sell, or distribute a Schedule III drug punishable by a maximum term of imprisonment of 6 years); Colo. Rev. Stat. Ann. § 18-405(2)(a)(II)(B) (second or subsequent offense punishable by a maximum term of imprisonment of 12 years).

Connecticut: Conn. Gen. Stat. Ann. § 21a-277(b) (West 2006) (illegal manufacture, distribution, or sale of non-narcotic controlled substance or hallucinogenic substance other than marijuana punishable by a term of imprisonment of not more than 7 years; second or subsequent offense punishable by a term of imprisonment of not more than 15 years).

Delaware: Del. Code Ann. tit. 16, § 4751(b) (2003) (unlawful manufacture, delivery, or possession with the intent to manufacture or deliver a Schedule III, IV, or V narcotic drug punishable by a maximum term of imprisonment of 5 years); Del. Code Ann. tit. 16, § 4752(a) (unlawful manufacture, delivery, or possession with the intent to manufacture or deliver a Schedule I, II, III, IV, or V non-narcotic drug punishable by a term of imprisonment of not more than 5 years); Del. Code Ann. tit. 16, § 4763(a)(1)(c) (for second or subsequent conviction un-

der Section 4751 (excepting heroin or any mixture containing heroin) or Section 4752, maximum term of imprisonment increased by not more than 5 years); Del. Code Ann. tit. 16, § 4763(a)(1)(d) (2003) (for second or subsequent conviction under Section 4751 involving heroin or any mixture containing heroin, maximum term of imprisonment increased by not more than 10 years); Del. Code Ann. tit. 11, § 4214(b) (2001) (for a third or subsequent conviction under Section 4751 or Section 4752, offender shall receive a sentence of life imprisonment).

Idaho: Idaho Code Ann. § 37-2732(a)(1)(B) (Supp. 2007) (unlawful manufacture, delivery, or possession with the intent to manufacture or deliver any Schedule I non-narcotic substance or a Schedule III controlled substance punishable by a term of imprisonment of not more than 5 years); Idaho Code Ann. § 37-2739(a) (2002) (for second or subsequent offense, term of imprisonment for up to twice the term otherwise authorized).

Illinois: 720 Ill. Comp. Stat. Ann. 570/401(d) (West 1997) (unlawful manufacture or delivery or possession with the intent to manufacture or deliver a Schedule I or II narcotic drug, LSD, or amphetamine punishable by a maximum term of imprisonment of 7 years); 720 Ill. Comp. Stat. Ann. 570/401(e)-(h) (unlawful manufacture or delivery or possession with the intent to manufacture or deliver a non-narcotic Schedule I or II substance or any other III, IV, or V controlled substance punishable by a maximum term of imprisonment of 5 years); 720 Ill. Comp. Stat. Ann. 570/408(a) (for second or subsequent offense, term of imprisonment of up to twice the term otherwise authorized); see 730 Ill. Comp. Stat. Ann. 5/5-8-1(a)(5).

Indiana: Ind. Code Ann. § 35-48-4-3(a) (LexisNexis 2004) (unlawful manufacture, delivery, or possession with the intent to manufacture or deliver a Schedule IV controlled substance punishable by a maximum term of imprisonment of 8 years with an advisory sentence of 4 years); Ind. Code Ann. § 35-50-2-8(h) (LexisNexis Supp. 2007) (offender with two prior, unrelated felony convictions may be sentenced to up to three times the advisory sentence for the offense); see Ind. Code Ann. § 35-50-2-6(a) (LexisNexis Supp. 2007).

Iowa: Iowa Code Ann. § 124.401(1)(d) (West 2007) (unlawful manufacture, delivery or possession with the intent to manufacture or deliver flunitrazepam or 50 kilograms or less of marijuana punishable by a maximum term of imprisonment of 5 years); Iowa Code Ann. § 124.411(1) (for second or subsequent offense, term of imprisonment not to exceed three times the term otherwise authorized); see Iowa Code Ann. § 902.9(5) (West 2003 & 2007 Supp).

Kentucky: Ky. Rev. Stat. Ann. § 218A.1421(3)(a) (LexisNexis 2007) (trafficking in 8 or more ounces but less than 5 pounds of marijuana punishable by maximum term of imprisonment of 5 years); Ky. Rev. Stat. Ann. § 218A.1421(3)(b) (for second or subsequent offense, maximum term of imprisonment of 10 years); see Ky. Rev. Stat. Ann. § 532.060(2)(c) and (d) (LexisNexis 1999 & Supp. 2007).

Louisiana: La. Rev. Stat. Ann. § 40:970(B) (West 2001) (unlawful producing, manufacturing, distributing or dispensing or possessing with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance classified in Schedule V punishable by a maxi-

mum term of imprisonment of 5 years); La. Rev. Stat. Ann. § 40:982(A) (for second or subsequent offense, maximum term of imprisonment doubled).

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 1103(1-A)(B) (West 2001) (unlawful trafficking in a schedule X drug punishable by a maximum term of imprisonment of 5 years); Me. Rev. Stat. Ann. tit. 17-A, § 1105-A(1)(B)(3) (second or subsequent related to trafficking in schedule X drug punishable by a maximum term of imprisonment of 10 years); Me. Rev. Stat. Ann. tit. 17-A, § 1103(1-A)(E) (unlawful trafficking in marijuana in a quantity of more than one pound punishable by a maximum term of imprisonment of 5 years); Me. Rev. Stat. Ann. tit. 17-A, § 1105-A(1)(B)(4) (second or subsequent related to trafficking in marijuana in a quantity of more than one pound punishable by a maximum term of imprisonment of 10 years); see Me. Rev. Stat. Ann. tit. 17-A, § 4-A(3)(B) and (C).

Massachusetts: Mass. Ann. Laws ch. 94C, § 32B(a) (LexisNexis 2007 Supp.) (knowingly or intentionally manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute, or dispense a Class C controlled substance punishable by term of imprisonment of not more than 5 years); Mass. Ann. Laws ch. 94C, § 32B(b) (second or subsequent conviction punishable by a term of imprisonment of not more than 10 years).

Michigan: Mich. Comp. Laws Ann. § 333.7401(2)(b)(ii) (West 2001 & Supp. 2007) (unlawful manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a schedule 1, 2, or 3 substance (except marijuana) punishable by a term of imprison-

ment of not more than 7 years); Mich. Comp. Laws § 333.7401(2)(d)(ii) (unlawful manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 5 kilograms or more but less than 45 kilograms of marijuana punishable by a term of imprisonment of not more than 7 years); Mich. Comp. Laws § 333.7413(2) (West 2001) (for second or subsequent conviction, offender may be imprisoned for a term not more than twice the term otherwise authorized).

Minnesota: Minn. Stat. Ann. § 152.025(1) (West 2005) (unlawful sale of mixture containing marijuana or Schedule IV substance punishable by a term of imprisonment of not more than 5 years); Minn. Stat. § 152.025(3) (second or subsequent offense punishable by a term of imprisonment of not more than 10 years).

Nebraska: Neb. Rev. Stat. Ann. § 28-416(2)(c) (LexisNexis 2003 & 2006 Supp.) (unlawful manufacturing, distributing, delivering, dispensing, or possessing with the intent to manufacture, distribute, deliver, or dispense a Schedule VI or V controlled substance punishable by a maximum term of imprisonment of 5 years); Neb. Rev. Stat. Ann. § 29-2221(1) (for offender with two prior felony convictions, maximum term of imprisonment of not more than 60 years); see Neb. Rev. Stat. Ann. § 28-105(1) (LexisNexis 2003).

New Hampshire: N.H. Rev. Stat. Ann. § 318-B:26(I)(c) (LexisNexis Supp. 2006) (manufacturing, selling, prescribing, administering, or transporting or possessing with the intent to sell, dispense, or compound less than one-half ounce of cocaine, less than 1 ounce of any schedule I or II narcotic, less than 1 ounce of methamphetamine, less than 1 gram of heroin or crack cocaine, 5

ounces or more of marijuana, less than 500 milligrams of flunitrazepam, or any other Schedule I-IV drug punishable by a maximum term of imprisonment of not more than 7 years for first offense and of not more than 15 years for second or subsequent offense).

New Jersey: N.J. Stat. Ann. § 2C:35-5(b)(3), (5), (9)(6), (13) (West 2005) (manufacturing, distributing, or dispensing or possessing with the intent to manufacture, distribute, or dispense less than one-half ounce of heroin or cocaine, less than 1 ounce of a Schedule I or II narcotic, less than one-half ounce of methamphetamine, or any other Schedule I-IV substance punishable by a maximum term of imprisonment of 5 years); N.J. Stat. Ann. § 2C:43-7(a)(4) (if one or more prior felony convictions, maximum sentence of 10 years of imprisonment for violations of Section 2C:35-5(b)(3), (5) and (9)(b)); see N.J. Stat. Ann. § 2C:43-6(a)(3).

New York: N.Y. Penal Law § 220.75 (McKinney 2007 Supp.) (unlawful manufacture of methamphetamine in the first degree punishable by a maximum term of imprisonment of 9 years); N.Y. Penal Law § 70.70(3)(b)(i) (for second or subsequent offense, maximum term of imprisonment of 12 years); see N.Y. Penal Law §§ 60.04, 70.70(2)(a)(i).

Oklahoma: Okla. Stat. Ann. tit. 63, § 2-401(B)(3) (West 2004 & 2007 Supp.) (distributing, dispensing, transporting with intent to distribute or dispense, or possessing with the intent to manufacture, distribute, or dispense, a Schedule V controlled dangerous substance punishable by a term of imprisonment for not more than 5 years); Okla. Stat. Ann. tit. 21, § 51.1(A)(3) (West 2002) (second

or subsequent offense punishable by imprisonment for a term not exceeding 10 years).

Pennsylvania: 35 Pa. Stat. Ann. § 780-113(a)(30), (f)(1.1) and (f)(2) (West 2003 & Supp. 2007) (manufacture, delivery, possession with intent to manufacture or deliver certain Schedule I, II, or III controlled substances (excluding narcotics, methamphetamine, and marijuana in excess of 1000 pounds) punishable by a term of imprisonment not exceeding 5 years); 35 Pa. Stat. Ann. § 780-115 (West 2003) (second or subsequent offense punishable by a term of imprisonment up to twice that otherwise authorized).

Rhode Island: R.I. Gen. Laws § 21-28-4.01(4)(ii) (Supp. 2006) (manufacture, distribution, possession with intent to manufacture or distribute a Schedule III(d) controlled substance (steroids or hormones) punishable by term of imprisonment of not more than 5 years); R.I. Gen. Laws § 21-28-4.11(A) (2003) (second offense punishable by a term of imprisonment up to twice the term authorized); R.I. Gen. Laws § 21-28-4.14(a) (third or subsequent offense punishable by a term of imprisonment up to three times the term authorized).

South Carolina: S.C. Code Ann. § 44-53-370(b)(2) (2002) (manufacturing, distributing, dispensing, delivering, or purchasing or possessing with the intent to manufacture, distribute, dispense, deliver, or purchase a Schedule I, II, or III substance (excepting a narcotic or LSD classified in Schedule I(b) or (c)) or flunitrazepam punishable by a term of imprisonment of not more than 5 years for first offense; for second offense, punishable by a term of imprisonment of not more than 10 years;

for third or subsequent offense, punishable for a term of imprisonment of not more than 20 years).

South Dakota: S.D. Codified Laws § 22-42-3 (West 2006) (unauthorized manufacturing, distributing, or dispensing or possessing with the intent to manufacture, distribute, or dispense a Schedule III controlled substance punishable by a maximum term of imprisonment of 5 years); S.D. Codified Laws § 22-42-4 (unauthorized manufacturing, distributing, or dispensing or possessing with the intent to manufacture, distribute, or dispense a Schedule IV controlled substance punishable by a maximum term of imprisonment of 2 years); S.D. Codified Laws § 22-7-7 (if offender has one or two prior felony convictions, principal felony is punished by changing class of principal felony to next class which is more severe; under this provision, a violation of Section 22-42-3 would be punished by a maximum term of imprisonment of 10 years); S.D. Codified Laws § 22-7-8 (if offender has three or more prior felony convictions including one or more conviction for a crime of violence, principal felony is punished by life imprisonment); see S.D. Codified Laws § 22-6-1.

Texas: Tex. Health & Safety Code Ann. § 481.112(b) (West 2003) (manufacturing, delivering or possessing with the intent to manufacture or deliver less than one gram of a substance in Penalty Group I is a felony punishable by up to two years in state jail); Tex. Health & Safety Code Ann. § 481.1121(b)(1) (manufacturing, delivering or possessing with the intent to manufacture or deliver fewer than 20 abuse units of a substance in Penalty Group I-A is a felony punishable by up to two years in state jail); Tex. Health & Safety Code Ann. § 481.113(b) (manufacturing, delivering or possessing

with the intent to manufacture or deliver less than one gram of a substance in Penalty Group 2 is a felony punishable by up to two years in state jail); Tex. Penal Code § 12.42 (a)(1) (West Supp. 2007) (third state jail felony punishable as a third-degree felony by not more than 10 years of imprisonment); see Tex. Penal Code § 12.35(a).

Utah: Utah Code Ann. § 58-37-8(1)(a)(i), (b)(ii) (Supp. 2007) (producing, manufacturing, dispensing or possessing with the intent to produce, manufacture, or dispense a Schedule III or IV substance or marijuana punishable by a term of imprisonment not to exceed 5 years for first conviction and by a term of imprisonment not more than 15 years for second or subsequent offense); see Utah Code Ann. § 76-3-203 (2003).

Vermont: Vt. Stat. Ann. tit. 18, § 4230(b)(2) (Supp. 2007) (knowing and unlawful dispensing or sale of one-half ounce or more of marijuana punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4231(b)(1) (2002) (knowing and unlawful sale of cocaine punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4232(b)(1) (Supp. 2007) (knowing and unlawful sale of LSD punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4233(b)(1) (Supp. 2007) (knowing and unlawful sale of heroin punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4234(b)(1) (2002) (knowing and unlawful sale of depressant, stimulant, or narcotic drug other than cocaine or heroin punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4234a(b)(1) (knowing and unlawful sale of methamphetamine punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4235(c)(1)

(2002) (knowing and unlawful sale of hallucinogenic drug other than LSD punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4235a(b)(1) (2002) (knowing and unlawful sale of Ecstasy punishable by a term of imprisonment of not more than 5 years); Vt. Stat. Ann. tit. 18, § 4238 (2002) (second or subsequent offense punishable by a term of imprisonment up to twice of that authorized by the above sections).

West Virginia: W. Va. Code § 60A-4-401(a)(ii) (manufacture, delivery, or possession with the intent to manufacture or deliver a Schedule I, II, or III non-narcotic controlled substance punishable by a term of imprisonment of not more than 5 years); W. Va. Code § 60A-4-408(a) (second or subsequent offense punishable by a term of imprisonment of up to twice the term otherwise authorized).

Wisconsin: Wis. Stat. Ann. § 961.41(1)(b) (West 2007) (manufacture, distribution, or delivery of a Schedule I, II, or III non-narcotic drug a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1)(h)(2) (manufacture, distribution, or delivery of more than 200 grams but not more than 1000 grams of tetrahydrocannabinols a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1)(i) (manufacture, distribution, or delivery of a Schedule IV drug a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1m)(b) (possession with the intent to manufacture, distribute, or deliver a Schedule I, II, or III non-narcotic drug a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1m)(h)(2) (pos-

session with the intent to manufacture, distribute, or deliver more than 200 grams but not more than 1000 grams of tetrahydrocannabinols a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.41(1m)(i) (possession with the intent to manufacture, distribute, or deliver a Schedule IV drug a Class H felony punishable by a term of imprisonment not to exceed 6 years); Wis. Stat. Ann. § 961.48(1)(b) (for second or subsequent offense, maximum term of imprisonment for Class H felony increased by not more than 4 years); see Wis. Stat. Ann. § 939.50(3)(h) (West 2005).

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No. 06-1646

FILED
NOV 5 - 2007
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SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JULY 11, 2007
CERTIORARI GRANTED: SEPT. 25, 2007

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 04-30397

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
9/29/04	DOCKETED CASE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 9/22/04; setting schedule as follows: transcript shall be ordered by 10/13/04 for Gino Gonzaga Rodriquez; transcript shall be filed by 11/12/04; appellants' briefs, excerpts due by 12/22/04 for Gino Gonzaga Rodriquez; appellees' brief due 1/21/05 for USA; appellants' reply brief due by 2/4/05 for Gino Gonzaga Rodriquez. (RT required: yes) (Sentence imp 92 months) [04-30397] (af) [04-30397]
	* * * * *
12/7/04	Filed motion and deputy clerk order: (Deputy Clerk: tah) The governments motion to consolidate 04-30397 and 04-

DATE	PROCEEDINGS
	30494 is granted. The following cross-appeal briefing schedule shall govern: the deft's opening brf is due 1/11/05. The government's opening/answering brief is due 2/22/05; the deft's reply/answering brief is due 3/24/05. Crt records do not currently reflect that the dc has issued the COR for 04-30494. The govt shall monitor the issuance of the certificate. (Motion recvd 12/3) [04-30397, 04-30494] (ft) [04-30397 04-30494]
	* * * * *
5/6/05	Filed original and 15 copies of Deft Gino Gonzaga Rodriguez in 04-30397 first brief on cross-appeal, (Informal: no) of 37 pages and 5 excerpts of record in 1 vol; served on 5/5/05. [04-30397, 04-30494] (af) [04-30397 04-30494]
	* * * * *
6/24/05	Filed original and 15 copies of USA's second brief on cross-appeal (Informal: n) of 32 pages and 5 supplemental excerpts of record in 1 volume; served on 6/20/05 (minor Deficiency: Need White covers for Supplemental excerpts of record) Notified Counsel [04-30397, 04-30494] (ba) [04-30397 04-30494]

DATE	PROCEEDINGS
	* * * * *
8/3/05	Filed original and 15 copies Gino Gonzaga Rodriquez in 04-30397, Gino Gonzaga Rodriquez in 04-30494 third brief on cross-appeal (Informal: n) of 12 pages and 5 copies of record; (minor defcy: needs red covers); served on 8/2/05 [04-30397, 04-30494] (ft) [04-30494]
	* * * * *
8/15/05	Filed original and 15 copies USA in 04-30397, USA in 04-30494 reply brief, (Informal: n) of 6 pages; served on 8/11/05 [04-30397] (ft) [04-30397 04-30494]
	* * * * *
1/23/06	ARGUED AND SUBMITTED TO Johnnie B. RAWLINSON, Richard R. CLIFTON, Consuelo B. Marshall. [04-30397, 04-30494] (sb) [04-30397 04-30494]
	* * * * *
10/5/06	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Johnnie B. RAWLINSON, author; Richard R. CLIFTON; Consuelo B. Marshall.) FILED AND ENTERED

DATE	PROCEEDINGS
	JUDGMENT. [04-30397, 04-30494] [04-30397 04-30494]
	* * * * *
11/20/06	Filed original and 40 copies Appellee USA in 04-30397, Appellant USA in 04-30494 petition for panel rehearing and petition for rehearing en banc 17 p.pages, served on 11/20/06 PANEL AND ALL ACTIVE JUDGES AND ANY INTEREST SENIOR JUDGES [04-30397, 04-30494] (ft) [04-30397 04-30494]
1/12/07	Filed order (Johnnie B. RAWLINSON, Richard R. CLIFTON, Consuelo B. Marshall): The petition for rehearing en banc filed on 11/20/06, is DENIED in 04-30397 and 04-30494. [04-30397, 04-30494] (rayc) [04-30397 04-30494]
1/22/07	MANDATE ISSUED [04-30397, 04-30494] (ft) [04-30397 04-30494]
	* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CRIMINAL DOCKET NO. 2:03-CR-00142

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
07/03/2003	1	COMPLAINT filed against defendant Gino Gonzaga Rodriquez by Magistrate Judge Cynthia Imbrogno [2:03-m-341] (LS) Modified on 07/11/2003 (Entered: 07/03/2003)
	* * * * *	
07/15/2003	10	INDICTMENT by USA Joseph H Harrington. Gino Gonzaga Rodriquez Count 1 (S/CI) dft continued detained (LE) (Entered: 07/16/2003)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
07/16/2003	13	ORDER ON PLEA by Magistrate Judge Cynthia Imbrogno: Not Guilty plea entered: dft continued detained (cc: USA, USM, Prob and Atty) (LE) (Entered: 07/16/2003)
07/16/2003	13	ORDER ON PLEA by Magistrate Judge Cynthia Imbrogno: Not Guilty plea entered: dft continued detained (cc: USA, USM, Prob and Atty) (LE) (Entered: XX)
	* * * * *	
01/26/2004	41	DAY ONE JURY TRIAL MINUTES: Hearing Location: Spokane CR: Debra Clark before Judge Robert H. Whaley jury trial held, jury impaneled, Court grants Defendant's Motions in Limine re: gang affiliation, etc. Court adjourned at 4:50 (RF) (Entered: 01/27/2004)
	* * * * *	
01/27/2004	44	DAY TWO JURY TRIAL MINUTES: Hearing Location: Spokane CR: Debra

DATE	DOCKET NUMBER	PROCEEDINGS
		Clark before Judge Robert H. Whaley Jury began deliberations at 11:45; Jury excused at 5:15 (RF) (Entered: 01/28/2004)
01/28/2004	45	DAY THREE JURY TRIAL MINUTES with WITNESS LIST & EXHIBIT LIST: Hearing Location: Spokane CR: Debra Clark before Judge Robert H. Whaley: Jury reached verdict: Guilty to Count 1 (RF) (Entered: 01/28/2004)
01/28/2004	46	COURT'S Jury Instructions (RF) (Entered: 01/28/2004)
01/28/2004	47	VERDICT find Gino Gonzaga Rodriquez guilty Gino Gonzaga Rodriquez count 1 (RF) (Entered: 01/28/2004)
		* * * * *
04/30/2004	56	OBJECTIONS by defendant to the Presentence Investigation Report (LE) (Entered: 04/30/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
05/07/2004	57	RESPONSE by plaintiff to objections to the presentence investigation report [56-1] (SAP) (Entered: 05/07/2004)
		* * * * *
05/26/2004	64	ORDER Directing Parties to Address Sentencing Issue by Judge Robert H. Whaley parties are directed to be prepared to discuss, at the sentencing hearing on 5/27/04, whether Wash. Rev. Code 69-5.408 is a "sentencing enhancement" and, if so, whether Congress intended the sentencing court to consider such an enhancement when determining whether a conviction qualifies as a "serious drug offense" (cc: all counsel) (CR) (Entered: 05/26/2004)
		* * * * *
06/24/2004	68	Defendant's Supplemental SENTENCING memorandum by Gino Gonzaga Rodriquez (RF) (Entered: 06/24/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
06/24/2004	69	SUPPLEMENTAL BRIEFING CONCERNING SENTENCING by USA (LE) (Entered: 06/25/2004)
06/30/2004	70	RESPONSE by USA to dft's Supplemental Memorandum [68-1] re Sentencing (LE) (Entered: 06/30/2004)
	* * * * *	
07/07/2004	72	SECOND SUPPLEMENTAL MEMORANDUM CONCERNING RCW 69.50.408 by USA (LE) (Entered: 07/072004)
08/06/2004		Courtroom Deputy Modification (Utility Event); sentencing hrg set 11:30 9/2/04 for Gino Gonzaga Rodriquez Spokane, WA (MF) (Entered: 08/06/2004)
08/26/2004	73	REPLY by defendant to USA's Response to Dft's Supplemental Memorandum (LE) (entered: 08/26/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
08/31/2004	74	United States' SUR RESPONSE to Defendant's Reply to Response to Defendant's Supplemental Memorandum [73-1] (RF) (Entered: 09/01/2004)
09/02/2004		Courtroom Deputy Modification (Utility Event); sentencing hrg set 10:00 9/3/04 for Gino Gonzaga Rodriquez Spokane, WA (MF) (Entered: 09/02/2004)
09/02/2004	75	MINUTES: DAY 1 SENTENCING HEARING - Hearing Location: Spokane, WA CR/ER: Debra Clark before Judge Robert H. Whaley sentencing hearing held 9/2/04 sentencing continued to 9/3/04 at 10:00 (LE) Modified on 09/03/2004 (Entered: 09/03/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
09/03/2004	76	MINUTES: DAY 2 SENTENCING HEARING - Hearing Location: Spokane, WA CR/ER: Debra Clark before Judge Robert H. Whaley (LE) (Entered: 09/03/2004)
09/03/2004	77	SENTENCING ORDER by Judge Robert H. Whaley (cc: all counsel, PROB) (LE) (Entered: 09/03/2004)
09/10/2004		LODGED NOTICE OF APPEAL by defendant (LE) (Entered: 09/13/2004)
09/15/2004	78	JUDGMENT sentencing Gino Gonzaga Rodriquez Count 1. IMPRISONMENT 92 months; SUPERVISED RELEASE 3 years; SPECIAL ASSESSMENT $100.00; FINE WAIVED, dft remanded to custody of USM case terminated (cc: USA, USM, PROB, ATTY) (LE) (Entered: 09/16/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
09/15/2004	79	NOTICE OF APPEAL TO 9CCA: Unknown; by defendant re judgment [78-3] (c:9CCA, USA, USM, PROB, ATTY, CR) 9CCA #04-30397 (LE) modified on 10/04/2004 (Entered: 09/17/2004)
	* * * * *	
09/28/2004	82	NOTICE OF APPEAL TO 9CCA. 9CCA# Unknown, by USA [78-3] (LE) Modified on 1/3/2005 to add 9CCA #04-30494 (LE, Case Administrator). (Entered: 09/28/2004)
	* * * * *	
02/25/2005	101	Judgment Returned Executed as to Gino Gonzaga Rodriquez on 1/13/05 re [78] Judgment (RF, Case Administrator) (Entered: 02/25/2005)

[Gov't Exh. 6]

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01070-0

PA# 95-9-89741-0
RPT# 02-94-95700-0
RCW 69.50.401(a)D-F (#56002)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ, WM [REDACTED],
DEFENDANT(S)

[Filed: Nov. 21, 1995]

JUDGMENT AND SENTENCE
(FELONY)

I. HEARING

1.1 A sentencing hearing in this case was held: *11-16-95*

1.2 Present were:

Defendant: GINO GONZAGA RODRIGUEZ
Defendant's Lawyer: PAUL WASSON
Deputy Prosecuting Attorney:
DIANNE G. DOUGHERTY
Other:

1.3 The State has moved for dismissal of Count(s) _____.

1.4 Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report and case record to date, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 11-16-95 by [plea] ~~[verdict] [jury] [non jury]~~ of:

Count No.: I Crime: DELIVERY OF A CONTROLLED SUBSTANCE NARCOTIC FROM SCHEDULE III-V
RCW 69.50.401(a)D-F (#56002)
Date of Crime December 29, 1994
Incident No. 02-94-95700-0

Count No.: _ Crime: _____
RCW _____
Date of Crime _____
Incident No. _____

Count No. : _ Crime: _____
RCW _____
Date of Crime _____
Incident No. _____

( ) With a special verdict/finding for use of deadly weapon on Count(s): (RCW 9.94A.125)

( ) With a special verdict/finding of sexual motivation on Count(s): _____. (RCW 9.94A.127)

( ) With a special verdict/finding of RCW 69.50.401(a) violation in a school bus or within 1000 feet of a school bus route stop or 1000 feet of the perimeter of a school grounds. (RCW 69.50.435)

( ) Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

( ) Additional current offenses attached in Appendix A.

2.2 CRIMINAL HISTORY: Criminal history used in calculating the offender score is (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Crime Type
DCS	*current*	*A*	*11-10-94*	*drug*
DCS	"	*A*	*3-29-94*	*drug*
PCS	"	*A*	*1-10-95*	*drug*

( ) Additional criminal history is attached in Appendix B.

( ) Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)):

2.3 SENTENCING DATA:

	Offender Score	Seriousness Level	Range	Maximum Term
Count No. *I*	*7*	*4*	*43-57 mons*	*10 years*
Count No. __	_____	____	_____	_____
Count No. __	_____	____	_____	_____

( ) Additional current offenses sentencing information is attached in Appendix C.

2.4 EXCEPTIONAL SENTENCE:

( ) Substantial and compelling reasons exist which justify a sentence (above) (below) the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. (RCW 9.94A.390)

2.5 CATEGORY OF OFFENDER: The defendant is:

(a) (x) An offender who shall be sentenced to confinement of over one year.

(b) ( ) An offender who shall be sentenced to confinement of one year or less.

(c) ( ) A first time offender who shall be sentenced under the waiver of the presumptive sentence range (RCW 9.94A.030(20), .120(5)).

(d) ( ) A sexual offender who is eligible for the special sentencing alternative and who shall be sentenced under the alternative

because both the defendant and the community will benefit from its use (RCW 9.94A.120(7)(a)).

(e) ( ) A felony sexual offender who shall be sentenced to confinement of over one year but less than six years and shall be ordered committed for evaluation of defendant's amenability to treatment (RCW. 9.94A.120(7)(b)).

(f) ( ) A persistent offender as defined in 9.94A.030(25) who shall be sentenced in accordance with 9.94A.120(4) to total confinement for life without the possibility of parole.

III. JUDGMENT

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set froth below.

4.1 The Court, having examined the defendant's ability to pay monetary obligations, makes the following findings:

(x) The defendant [does] **[does not]** have the present ability to pay toward financial obligation herein.

(x) There [is] [is not] a likelihood of the defendant having a future ability to pay toward financial obligations herein.

(x) Defendant shall pay the following legal financial obligation to the Clerk of the Court:

(a) $110.00, Court costs; (RCW 36.18.020(18))

(b) $100.00 Victim Assessment; (RCW 7.68.035)

(c) ( ) $ _____, Restitution [per schedule to be filed];

( ) $ _____, Restitution for emergency response of a public agency; to-wit:

(38.52.)

( ) $_____, Restitution to ___for costs of extradition; (9.94A.030(10)(25)

( ) (d) $ _____, Recoupment for attorney's fees;

(x) (e) $100.00 state crime laboratory fee for each offense for a total of $*100.00*. The crime(s) for which the defendant has been adjudged guilty herein involve(s) a state crime laboratory analysis. (RCW 43.43.690)

( ) Upon a verified petition by the defendant relating to his/her ability to pay the fee, the court suspends $ ___ of said fee.

( ) (f) $125.00 state toxicology laboratory fee. (RCW 46.61.515)

( ) Upon a verified petition by the defendant relating to his/her ability to pay the fee, the court suspends $ _____ of said fee.

(x) (g) $ *1,000.00*, Fine; [ ] VUCSA additional fine waived due to indigency. (RCW 69.50.430)

( ) (h) $_____,Drug enforcement fund of ____. (RCW 69.50.520)

( ) (i) $_____, Other costs for:

( ) The defendant (does) (does not) have the means to pay for the costs of incarceration.

( ) The defendant shall pay the cost of incarceration at the rate of $50.00 per day. (RCW 9.94A.145(2))

$ *1,310.00* , TOTAL legal financial obligations.

Commencing with the first full month after the date of this Judgment and Sentence or after release from confinement, the defendant shall pay not less than $ *set by DOC* per month, subject to adjustment by the court as necessary upon the recommendation of the community corrections officer, to the Clerk of the Court until the total legal financial obligation is paid in full (with credit for amounts paid by co-defendants), to be paid in full by *11/11/2005* with a report by the Department of Corrections to be submitted to the court by *11-16-2001*. The Department of Corrections shall monitor all assets and earnings of the defendant while

s/he is confined and shall deduct appropriate amounts to be forwarded to the Clerk of the Court to satisfy the court-ordered legal financial obligations as provided for herein.

Upon receipt, the Clerk of the Court shall distribute the restitution to:

( ) Schedule of Restitution is attached as Appendix E.

( ) Schedule of Restitution to be filed.

( ) A notice of payroll deduction is to be immediately issued. (RCW 9.94A.145(3))

(x) A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the defendant if a monthly court-ordered legal financial obligation payment is not paid when due, and an amount equal to or greater than the amount payable for one month is owed. (RCW 9.94A/145)(3))

The court shall retain jurisdiction over the defendant for the greater of ten (10) years, subject to adjustment by the court, from the date of this Judgment and Sentence or from the defendant's last date of release from confinement pursuant to a felony conviction to assure payment of the above legal financial obligations. The defendant shall report to the Department of Corrections to monitor compliance; and obey conditions as provided by RCW 9.94A.120(12) and RCW 9.94A.145. Provided further, the Department of Corrections shall assist the court in setting or modifying the minimum monthly sum, when necessary, by investigating and reporting to the court on the monthly amount the offender should pay toward said legal financial obligation, considering the

defendant's financial circumstances, capabilities, and assets as determined under the provisions of RCW 9.94A.145.

( ) The defendant has been found guilty of an offense involving fraud or a deceptive practice and shall give notice of the conviction to the class of persons or sector of public affected or financially interested in the subject of the offense; to-wit: by mail, advertising or through the media as designated, to-wit:

4.3 CONFINEMENT OVER ONE YEAR: The defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing *1 Nov*, 19*95*:

48 months for Count No. *I*

_____ months for Count No. ___

_____ months for Count No. ___

( ) The terms in Counts No.____to be concurrent for a total term of ___months.

( ) The terms in Counts No. ___to be consecutive for a total term of _____ months.

(x) The sentence herein to run **(concurrently)** (consecutively) with the sentence in *95-1-01071-8, 95-1-01089-1*
(Count(s) or cause number(s))

(x) Credit be given for (time) (*168* days) served solely on these charges.

( ) Confinement in a work ethic camp is recommended if defendant is eligible. (RCW 9.94A.137).

( ) Upon completion of the Work Ethic Camp, defendant shall be released on community custody for any remaining time of total confinement.

(x) The defendant is sentenced to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of earned early release, according to the conditions set out in Appendix G.

( ) This being a [sex offense] [serious violent offense] committed on or after July 1, 1990, the defendant is sentenced to community placement for two (2) years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, beginning either upon completion of the term of confinement or at such time the defendant is transferred to community custody in lieu of earned early release, according to the conditions set out in Appendix G.

( ) The defendant, having been convicted of a felony sex offense, shall register with the County Sheriff where the defendant resides within twenty-four (24) hours of release from confinement and/or placement on community supervision as a convicted sex offender.

4.4 (x) Pursuant to RCW 70.24.340 the defendant shall submit to HIV testing as soon as possible, be provided pre-test counseling and be provided post-test counseling for the reason that:

( ) The offense herein is a sexual offense under RCW 9A.44.

( ) The offense herein is a prostitution offense or related to prostitution under RCW9A.88.

( ) The offense herein is a drug offense under RCW 69.50 and it is determined by the court that the related drug offense is one associated with the use of hypodermic needles.

Provided further the results of the HIV test are to be confidential but are to be provided to the victim, prosecuting attorney, community corrections officer and the public defender as necessary.

4.5 ( ) Pursuant to RCW 43.43.754, the defendant shall have a blood sample drawn for purposes of DNA identification analysis prior to his/her release from a department of corrections facility, this conviction being for:

( ) A felony defined as a sex offense under RCW 9.94A.030(29)(a)

( ) A violent offense as defined under RCW 9.94A.030(32).

The following appendices are attached to this Judgment and Sentence and are incorporated by reference:

(x) Appendix A, Understanding of Defendant's Criminal History

( ) Appendix B, Additional Criminal History

( ) Appendix C, Understanding of Defendant's Criminal History

( ) Appendix D, Findings of Fact and Conclusions of Law for Exceptional Sentence

( ) Appendix E, Schedule of Restitution

( ) Appendix F, Additional Conditions

(x) Appendix G, Conditions of Community Placement

( ) Appendix H, Order Prohibiting Contact

( ) Appendix I, Notification of Registration Requirement

(x) Appendix J, Advice of Time Limit for Filing Collateral Relief

Date: *11/16/95*

/s/ TARI S. EITZEN
Judge TARI S. EITZEN
Approved as to from:

Presented by:

/s/ DIANNE G. DOUGHERTY
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney
WA State Bar ID #: *16027*

/s/ PAUL WASSON
PAUL WASSON
Lawyer for Defendant
WA State Bar ID #: *5854*

BEST AVAILABLE COPY

FINGERPRINTS

25

Right Hand
Fingerprints of:

GINO GONZAGA RODRIQUEZ

ADDRESS:

Attested by:

THOMAS R. FALLQUIST, County Clerk

By: _____, deputy

Dated:

By:

CERTIFICATE

I, _____
Clerk of this Court, certify that the above is a true copy of the Judgment and Sentence in this action on record in my office.

Dated: _____

_____
Clerk

By: _____
Deputy Clerk

OFFENDER IDENTIFICATION

S.I.D. NO. 014653368
Date of Birth 07 26 62
Sex MALE
Race WHITE
ORI WA032013A
OCA 150616
OIN 02-94-95700-0
DOA 12 30 94

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01070-0

PA# 95-9-89741-0
RPT# 02-94-95700-0
RCW 69.50.401(a)D-F (#56002)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ,
WM [REDACTED], DEFENDANT(S)

[Filed: Nov. 21, 1995]

STATEMENT OF DEFENDANT ON PLEA OF GUILTY TO A FELONY

I. STATEMENT OF DEFENDANT

1. My true name is *Gino G. Rodriquez*. I am also known as *n/a*.

2. My age is *33*. Date of birth [REDACTED].

3. I went through the _____ grade.

4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:

(a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer,

one will be provided at no expense to me. My lawyer's name is PAUL WASSON.

(b) I am charged with the crime(s) of: DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V, and the elements of the crime(s) are: *In Spokane County to knowingly deliver, as principle [sic] or accomplice, a narcotic substance*.

5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself.

(c) The right at trial to hear and question witnesses who testify against me.

(d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed innocent until the charge is proven beyond a reasonable doubt, or I enter a plea of guilty.

(f) The right to appeal certain pretrial court decisions and any determination of guilt after trial.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) The crime with which I am charged carries a maximum sentence of *10* years imprisonment and a $ *20,000* fine. The standard sentence range is from *43* months to *57* months confinement, based on the prosecuting attorney's understanding of my criminal history.

(b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes convictions in juvenile court for felonies or serious traffic offenses that were committed when I was 15 years of age or older. Juvenile convictions, except those for class A felonies, count only if I was less than 23 years old when I committed the crime to which I am now pleading guilty.

(c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard range and the prosecuting attorney's recommendation increase.

(e) In addition to sentencing me to confinement for the standard range, the judge will order me to pay $ *100* as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs and attorney fees. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(f) The prosecuting attorney will make the following recommendations to the judge: *Amend this information; dismiss several other counts; allow me to argue for low end of range and ask for furlough*.

(g) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the court finds substantial and compelling reasons not to do so. If the court goes outside

the standard range, either I or the State can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

* * * * *

7. I plead *guilty* to the crime(s) of DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V, as charged in the [Amended] Information. I have received a copy of that Information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime. This is my statement. *I have several counts facing me in 3 separate information. I agree there are enough facts to convict me on some counts.*

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

/s/ GINO RODRIQUEZ
GINO RODRIQUEZ
Defendant

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

/s/ DIANNE G. DOUGHERTY
DIANNE G. DOUGHERTY
DEPUTY PROSECUTING ATTORNEY
WA State Bar ID #: *16021*

/s/ PAUL WASSON
PAUL WASSON
DEFENDANT'S LAWYER
WA State Bar ID #: *5854*

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]

☒ the defendant had previously read

or

☐ the defendant's lawyer had previously read to him or her

or

*☐ an interpreter had previously read to the defendant

the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charge and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Date this *16* day of *Nov.*, 19*95*.

/s/ TARI S. EITZEN
JUDGE TARI S. EITZEN

* I am a certified interpreter or have been found otherwise qualified by the court to interpret in the ____ language which the defendant understands, and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his/her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Date this _____ day of _____, 19___.

_____
INTERPRETER

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01070-0
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney

PA# 95-9-89741-0
RPT# 02-94-95700-0
RCW 69.50.401(a)D-F (#56002)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ WM [REDACTED],
DEFENDANT(S)

[Filed: Nov. 21, 1995]

AMENDED INFORMATION

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crimes(s):

DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about December 29, 1994, did knowingly deliver a controlled substance, to-wit: narcotic from Schedule III-V,

/s/ DIANNE G. DOUGHTERY
DIANNE G. DOUGHTERY
Deputy Prosecuting Attorney

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01070-0
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney

PA# 95-9-89741-0
RPT# 02-94-95700-0
RCW CT I: 69.50.401(a)D-F (#56002)
CT II: 69.50.401(d)-F (#56603)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ, WM [REDACTED],
DEFENDANT(S)

[Filed: May 19, 1995]

INFORMATION

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about December 29, 1994, did knowingly deliver a controlled substance, to-wit: heroin,

COUNT II: And the Prosecuting Attorney, as aforesaid, further charges the defendant, GINO GONZAGA RODRIQUEZ, with the crime of POSSESSION OF A CONTROLLED SUBSTANCE, committed as follows:

That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about December 29, 1994, did unlawfully possess a controlled substance, to-wit: heroin,

/s/ DIANNE G. DOUGHTERY
DIANNE G. DOUGHTERY
Deputy Prosecuting Attorney
WA St. Bar ID # *16081*

STATEMENT OF INVESTIGATING OFFICER
AFFIDAVIT OF FACTS

REPORT #: 94-95700

STATE OF WASHINGTON COUNTY OF SPOKANE

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT,
M/M, [REDACTED]

[Filed: May 19, 1995]

The undersigned, a law enforcement officer, competent to testify, states as follows: that he/she believes a crime was committed by the above-named defendant/s in the City & County of Spokane, State of Washington, because:

On 12/29/94, the Spokane Police Department's Special Investigative Unit made a controlled purchase of Heroin using a Cooperative Individual at [REDACTED]. The CI was searched prior to and after the buy, with no unauthorized items or monies found. The CI was given prerecorded US currency and transported to the area of 1320 W. Sinto. Surveillance was maintained while the CI was at that location. The CI entered the residence, exited a short time later and immediately returned to the control officer.

On 12/30/94, SIU/SPD executed a search warrant at [REDACTED]. Entry was made into the residence at 1032 hours. Mr. RODIGUEZ [*sic*] was arrested for DELIVERY OF A CONTROLLED SUBSTANCE and searched incident to the search warrant and his arrest.

Found in his left front pants pocket was a large amount of cash, later found to be $1186 in US currency. $110 of this money proved to be our prerecorded "buy money". Corrections Officer Gooch searched RODRIGUEZ [*sic*] at Jail and found a small heat-sealed package of Heroin. Detective Burbridge did field-test this Heroin.

OFFICER JOLLEY - Can testify to searching the CI prior to & after the controlled purchase & found no unauthorized items or monies.

OFFICER BURBRIDGE - Can testify to transporting the CI to the area of [REDACTED], maintaining surveillance on the CI as the CI entered & exited the defendant's residence. Officer Burbridge can testify that the CI did give him a black tar substance & to giving this substance to Detective Quist. Officer Burbridge will testify to finding $1186 in US currency in Mr. RODRIGUEZ's [*sic*] left front pants pocket.

DETECTIVE QUIST - Can testify to recording times during the controlled purchase of Heroin from GINO RODRIGUEZ [*sic*] at [REDACTED]. Detective Quist will testify to taking possession of the black tar substance from Detective Burbridge. Detective Quist will testify to field-testing the substance and that it did field-test POSITIVE as Heroin. Detective Quist will testify that he did place this item on the property book under Property #114259, Item #1. Detective Quist will testify to transporting all items of evidence from [REDACTED] to the SIU office. After packaging those items, he did transport those items to the police property room under Property # 114259.

OFFICER GOOCH - Will testify to being a corrections officer at the Spokane County Jail. Officer Gooch will

testify that at the time of MR. RODRIGUEZ's [*sic*] booking, a small container containing a black tarry substance was found in Mr. RODRIGUEZ's [*sic*] right front shirt pocket.

DETECTIVE WILLIARD - Will testify to finding phone bills and other items of dominion and control and to generally assisting with the search warrant.

DETECTIVE GRUMBLY - Will testify to photographing the evidence. He will also testify to logging the evidence onto the property sheet. Detective Grumbly will testify to placing items to be sent to the WSP Crime Lab for testing into a drug envelope and sealing that drug envelope.

DETECTIVE McCABE - Will testify to assisting in execution of the search warrant and to assisting in packaging the property.

SGT. SCHERES - Will testify to assisting with the search warrant. He will testify that he sorted through the $1186 in U.S. currency found on Mr. RODRIGUEZ [*sic*] and finding $110 of our prerecorded "buy money" intermingled with this money.

WSP CHEMIST MELNIKOFF - Can testify to the chemical analysis of the evidence.

I testify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
(9A.72.085)

DATE: 4/5/95 PLACE: Spokane P.D.

Signature: /s/ ILLEGIBLE

[Gov't Exh. 7]

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01071-8

PA# 95-9-89740-2
RPT# CT I: 02-94-85326-0
CT II: 02-95-01134-0
RCW CT I: 69.50.401(a)D-F (#56002)
CT II: 69.50.401(d)-F (#56603)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ, WM [REDACTED],
DEFENDANT(S)

[Filed: Nov. 21, 1995]

JUDGMENT AND SENTENCE
(FELONY)

I. HEARING

1.1 A sentencing hearing in this case was held: *11-16-95*

1.2 Present were:

Defendant: GINO GONZAGA RODRIQUEZ
Defendant's Lawyer: PAUL WASSON
Deputy Prosecuting Attorney:
DIANNE G. DOUGHERTY
Other:

1.3 The State has moved for dismissal of Count(s) _____.

1.4 Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report and case record to date, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 11-16-95 by [plea] ~~[verdict] [jury] [non jury]~~ of:

Count No.: I Crime: DELIVERY OF A CONTROLLED SUBSTANCE NARCOTIC FROM SCHEDULE III-V AND

RCW CTI: 69.50.401(a)D-f (#56002)

Date of Crime NOVEMBER 10, 1994

Incident No. 02-94-85326-0

Count No.: II Crime: POSSESSION OF A CONTROLLED SUBSTANCE - HEROIN

RCW CT II: 69.50.401(d)-F (#56603)

Date of Crime JANUARY 10, 1995

Incident No. 02-95-01134-0

Count No. : _ Crime: _____
RCW _____
Date of Crime _____
Incident No. _____

( ) With a special verdict/finding for use of deadly weapon on Count (s): (RCW 9.94A.125)

( ) With a special verdict/finding of sexual motivation on Count (s): _____. (RCW 9.94A.127)

( ) With a special verdict/finding of RCW 69.50.401(a) violation in a school bus or within 1000 feet of a school bus route stop or 1000 feet of the perimeter of a school grounds. (RCW 69.50.435)

( ) Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

( ) Additional current offenses attached in Appendix A.

2.2 CRIMINAL HISTORY: Criminal history used in calculating the offender score is (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Crime Type	
Burglary	*10-17-80*	*A*	*3-10-80*	*NV*	
Steal Gun	*11-23-82*	*A*	*8-21-82*	*NV*	[*All Wash.*]
Poss Unlawful Check	*1984*	*A*	*2-23-84*	*NV*	

( ) Additional criminal history is attached in Appendix B.

( ) Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)):

2.3 SENTENCING DATA:

	Offender Score	Seriousness Level	Range	Maximum Term
Count No. *I*	*7*	*IV*	*43-57 mons*	*10 years*
Count No. *II*	*2*	*II*	*3-9 mons*	*5 years*
Count No. __	____	____	_____	_____

( ) Additional current offenses sentencing information is attached in Appendix C.

2.4 EXCEPTIONAL SENTENCE:

( ) Substantial and compelling reasons exist which justify a sentence (above) (below) the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. (RCW 9.94A.390)

2.5 CATEGORY OF OFFENDER: The defendant is:

(a) (x) An offender who shall be sentenced to confinement of over one year.

(b) ( ) An offender who shall be sentenced to confinement of one year or less.

(c) ( ) A first time offender who shall be sentenced under the waiver of the presumptive sentence range (RCW 9.94A.030(20), .120(5)).

(d) ( ) A sexual offender who is eligible for the special sentencing alternative and who shall be sentenced under the alternative because both the defendant and the community will benefit from its use (RCW 9.94.120(7)(a)).

(e) ( ) A felony sexual offender who shall be sentenced to confinement of over one year but less than six years and shall be ordered committed for evaluation of defendant's amenability to treatment (RCW 9.94A.120(7)(b)).

(f) ( ) A persistent offender as defined in 9.94A.030(25) who shall be sentenced in accordance with 9.94A.120(4) to total confinement for life without the possibility of parole.

III. JUDGMENT

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V and POSSESSION OF A CONTROLLED SUBSTANCE - HEROIN

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set froth below.

4.1 The Court, having examined the defendant's ability to pay monetary obligations, makes the following findings:

(✓) The defendant [does] **[does not]** have the present ability to pay toward financial obligation herein.

( ) There **[is]** [is not] a likelihood of the defendant having a future ability to pay toward financial obligations herein.

(✓) Defendant shall pay the following legal financial obligation to the Clerk of the Court:

(a) $110.00, Court costs; (RCW 36.18.020(18))

(b) $100.00 Victim Assessment; (RCW 7.68.035)

(c) ( ) $_____, Restitution [per schedule to be filed];

( ) $ _____ , Restitution for emergency response of a public agency; to-wit:

(38.52.);

( ) $ _____, Restitution to

for costs of

extradition; (9.94A.030(10)(25))

( ) (d) $ _____, Recoupment for attorney's fees;

(✓) (e) $100.00 state crime laboratory fee for each offense for a total of $*200.00*. The crime(s) for which the defendant has been adjudged guilty herein involve(s) a state crime laboratory analysis. (RCW 43.43.690)

( ) upon a verified petition by the defendant relating to his/her ability to pay the fee, the court suspends $ ___ of said fee.

( ) (f) $125.00 state toxicology laboratory fee. (RCW 46.61.515)

( ) upon a verified petition by the defendant relating to his/her ability to pay the fee, the court suspends $ _____ of said fee.

(x) (g) $*1,000.00*, Fine; [ ] VUCSA additional fine waived due to indigency. (RCW 69.50.430)

( ) (h) $_____Drug enforcement fund of ____. (RCW 69.50.520)

( ) (i) $_____, Other costs for:

( ) The defendant (does) (does not) have the means to pay for the costs of incarceration.

( ) The defendant shall pay the cost of incarceration at the rate of $50.00 per day. (RCW 9.94A.145(2))

$ *1,410.00* , TOTAL legal financial obligations.

Commencing with the first full month after the date of this Judgment and Sentence or after release from confinement, the defendant shall pay not less than $ *set by DOC* per month, subject to adjustment by the Court as necessary upon the recommendation of the community corrections officer, to the Clerk of the Court until the total legal financial obligation is paid in full (with credit for amounts paid by co-defendants), to be paid in full by

11/16/2005 with a report by the Department of Corrections to be submitted to the court by *11-16-2001*. The Department of Corrections shall monitor all assets and earnings of the defendant while s/he is confined and shall deduct appropriate amounts to be forwarded to the Clerk of the Court to satisfy the court-ordered legal financial obligation as provided for herein.

Upon receipt, the Clerk of the Court shall distribute the restitution to:

( ) Schedule of Restitution is attached as Appendix E.

( ) Schedule of Restitution to be filed.

( ) A notice of payroll deduction is to be immediately issued. (RCW 9.94A.145(3))

(✓) A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the defendant if a monthly court-ordered legal financial obligation payment is not paid when due, and an amount equal to or greater than the amount payable for one month is owed. (RCW 9.94A.145(3))

The court shall retain jurisdiction over the defendant for the greater of ten (10) years, subject to the adjustment by the court, from the date of this Judgment and Sentence or from the defendant's last date of release from confinement pursuant to a felony conviction to assure payment of the above legal financial obligations. The defendant shall report to the Department of Corrections to monitor compliance, and obey conditions as provided by RCW 9.94(A).120(12) and RCW 9.94A.145. Provided further, the Department of Corrections shall assist the court in setting or modifying the minimum monthly sum,

when necessary, by investigating and reporting to the court on the monthly amount the offender should pay toward said legal financial obligation, considering the defendant's financial circumstances, capabilities, and assets as determined under the provisions of RCW 9.94A.145.

( ) The defendant has been found guilty of an offense involving fraud or a deceptive practice and shall give notice of the conviction to the class of persons or sector of public affected or financially interested in the subject of the offense; to-wit: by mail, advertising or through the media as designated, to-wit:

4.3 CONFINEMENT OVER ONE YEAR: The defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing *2 Nov*, 19*95*:

48 months for Count No. *I*

3 months for Count No. *II*

_____ months for Count No. ___

( ) The terms in Counts No. _____ to be concurrent for a total term of _____ months.

( ) The terms in Counts No. _____ to be consecutive for a total term of _____ months.

(✓) The sentence herein to run **(concurrently)** (consecutively) with the sentence in *95-1-01070-0, 95-1-01089-1*

(Count(s) or cause number(s))

(✓) Credit be given for (time) (*165* days) served solely on these charges.

( ) Confinement in a work ethic camp is recommended if defendant is eligible. (RCW 9.94A.137).

( ) Upon completion of the Work Ethic Camp, defendant shall be released on community custody for any remaining time of total confinement.

(✓) The defendant is sentenced to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of earned early release, according to the conditions set out in Appendix G.

( ) This being a [sex offense] [serious violent offense] committed on or after July 1, 1990, the defendant is sentenced to community placement for two (2) years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, beginning either upon completion of the term of confinement or at such time the defendant is transferred to community custody in lieu of earned early release, according to the conditions set out in Appendix G.

( ) The defendant, having been convicted of a felony sex offense, shall register with the County Sheriff where the defendant resides within twenty-four (24) hours of release from confinement and/or placement on community supervision as a convicted sex offender.

4.4 (✓) Pursuant to RCW 70.24.340 the defendant shall submit to HIV testing as soon as possible, be provided pre-test counseling and be provided post-test counseling for the reason that:

( ) The offense herein is a sexual offense under RCW 9A.44.

( ) The offense herein is a prostitution offense or related to prostitution under RCW 9A.88.

( ) The offense herein is a drug offense under RCW 69.50 and it is determined by the court that the related drug offense is one associated with the use of hypodermic needles.

Provided further the results of the HIV test are to be confidential but are to be provided to the victim, prosecuting attorney, community corrections officer and the public defender as necessary.

4.5 ( ) Pursuant to RCW 43.43.754, the defendant shall have a blood sample drawn for purposes of DNA identification analysis prior to his/her release from a department of corrections facility, this conviction being for:

( ) A felony defined as a sex offense under RCW 9.94A.030(29)(a)

( ) A violent offense as defined under RCW 9.94A.030(32).

The following appendices are attached to this Judgment and Sentence and are incorporated by reference:

(✓) Appendix A, Understanding of Defendant's Criminal History

( ) Appendix B, Additional Criminal History

( ) Appendix C, Understanding of Defendant's Criminal History

( ) Appendix D, Findings of Fact and Conclusions of Law for Exceptional Sentence

( ) Appendix E, Schedule of Restitution

( ) Appendix F, Additional Conditions

(✓) Appendix G, Conditions of Community Placement

( ) Appendix H, Order Prohibiting Contact

( ) Appendix I, Notification of Registration Requirement

(✓) Appendix J, Advice of Time Limit for Filing Collateral Relief

Date: *11/16/95*

/s/ JUDGE TARI S. EITZEN
Judge TARI S. EITZEN

Presented by:

Approved as to form:

/s/ DIANNE G. DOUGHERTY
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney
WA State Bar ID #: *16021*

/s/ PAUL WASSON
PAUL WASSON
Lawyer for Defendant
WA State Bar ID #: *5854*

FINGERPRINTS

Right Hand
Fingerprints of:

GINO GONZAGA RODRIQUEZ

ADDRESS:

Dated:

Attested by:

THOMAS R. FALLQUIST, County Clerk

By: , deputy

By:

CERTIFICATE

I, _____
Clerk of this Court, certify that the above is a true copy of the Judgment and Sentence in this action on record in my office.

Dated: _____

_____
Clerk

By: _____
Deputy Clerk

OFFENDER IDENTIFICATION

S.I.D. NO. 014653368
Date of Birth 07 26 62
Sex MALE
Race WHITE
ORI WA032013A
OCA 150616
OIN 02-94-85326;95-01134-0
DOA 11 10 94

addrquez SFD

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01071-8
PA# 95-9-89740-2
RPT# CT I: 02-94-85326-0
CT II: 02-95-01134-0
RCW CT I: 69.50.401(a)D-F (#56002)
CT II: 69.50.401(d)-F (#56603)
STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ, WM [REDACTED],
DEFENDANT(S)

[Filed: Nov. 21, 1995]

STATEMENT OF DEFENDANT ON PLEA OF GUILTY TO A FELONY

I. STATEMENT OF DEFENDANT

1. My true name is *Gino G. Roariquez*. I am also known as *n/a*.
2. My age is *33*. Date of birth [REDACTED].
3. I went through the *12th* grade.

4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:

(a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is PAUL WASSON.

(b) I am charged with the crime(s) of: DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V, and POSSESSION OF A CONTROLLED SUBSTANCE - HEROIN, and the elements of the crime(s) are: *on separate dates in Spokane County, knowingly possess/deliver heroin/narcotics.*

5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself.

(c) The right at trial to hear and question witnesses who testify against me.

(d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed innocent until the charge is proven beyond a reasonable doubt, or I enter a plea of guilty.

(f) The right to appeal certain pretrial court decisions and any determination of guilt after trial.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) The crime with which I am charged carries a maximum sentence of imprisonment and a $ *20,000* fine. The standard sentence range is from *43* months to *57* months confinement, based on the prosecuting attorney's understanding of my criminal history.

(b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes convictions in juvenile court for felonies or serious traffic offenses that were committed when I was 15 years of age or older. Juvenile convictions, except those for class A felonies, count only if I was less than 23 years old when I committed the crime to which I am now pleading guilty.

(c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and

complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard range and the prosecuting attorney's recommendation increase.

(e) In addition to sentencing me to confinement for the standard range, the judge will order me to pay $ *100* as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs and attorney fees. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(f) The prosecuting attorney will make the following recommendations to the judge: *Amend this information; dismiss several other counts; allow me to ask for low end of range and ask for furlough*.

(g) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard range, either I or the State can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

* * * * *

7. I plead *guilty* to the crime(s) of DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V and POSSESSION OF A CONTROLLED SUBSTANCE - HEROIN, as charged in the [Amended] information. I have received a copy of that Information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime. This is my statement: *I face several counts in 3 separate informations. I agree there are facts sufficient to convict me on some counts.*

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this

"Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

/s/ GINO RODRIQUEZ
GINO RODRIQUEZ
Defendant

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

/s/ DIANNE G. DOUGHERTY
DIANNE G. DOUGHTERY
DEPUTY PROSECUTING ATTORNEY
WA State Bar ID #: 1604

/s/ PAUL WASSON
PAUL WASSON
DEFENDANT'S LAWYER
WA State Bar ID # 5854

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [Check appropriate box]

☒ the defendant had previously read

or ☐ the defendant's lawyer had previously read to him or her

or *☐ an interpreter had previously read to the defendant

the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently, and voluntarily made. Defendant understands the charge and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated this *16* day of *Nov.*, 19*95*

/s/ TARI S. EITZEN
Judge TARI S. EITZEN

* I am a certified interpreter or have been found otherwise qualified by the court to interpret in the _____ language which the defendant understands, and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his/her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this _____ day of _____, 19 ____.

_____
INTERPRETER

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01071-8
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney

PA# 95-9-89740-2
RPT# CT I: 02-94-85326-0
CT II: 02-95-01134-0
RCW CT I: 69.50.401(a)D-F (#56002)
CT II: 69.50.401(d)-F (#56603)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ, WM [REDACTED],
DEFENDANT(S)

[Filed: Nov. 21, 1995]

AMENDED INFORMATION

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about November 10, 1994, did knowingly deliver a controlled substance, to-wit: a narcotic from Schedule III-V,

COUNT II: And the Prosecuting Attorney, as aforesaid, further charges the defendant, GINO GONZAGA RODRIQUEZ, with the crime of POSSESSION OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about January 10, 1995, did unlawfully possess a controlled substance, to-wit: heroin,

/s/ DIANNE G. DOUGHERTY
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01071-8
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney

PA# 95-9-89740-2
RPT# 02-94-85326-0 COUNTS I-VI
02-95-01134-0 COUNTS VII-VIII
RCW CT I - IV: 69.50.401(a)
DCO-F (69.50.407) (#56610)
CT V: 69.50.401(a)P-F (#56202)
CT VI & VIII: 69.50.401(d) - F (#56603)
CT VII: 69.50.401(a)D-F (#56002)
RODRIQUEZ COUNTS I-VIII
TORGESON COUNT V ONLY
RYAN COUNT VI ONLY

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ, WM [REDACTED],
DEANNA MARIE TORGESON, WF [REDACTED],
DEBORAH ANN RYAN, WF [REDACTED],
DEFENDANT(S)

[Filed: May 19, 1995]

INFORMATION

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: CONSPIRACY TO DELIVERY A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about October 12, 1994, did unlawfully conspire w/others to deliver a controlled substance, to-wit: cocaine,

COUNT II: And the Prosecuting Attorney, as aforesaid, further charges the defendant, GINO GONZAGA RODRIQUEZ, with the crime of CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about October 12, 1994, did unlawfully conspire with others to deliver a controlled substance, to-wit: heroin,

COUNT III: And the Prosecuting Attorney, as aforesaid, further charges the defendant, GINO GONZAGA RODRIQUEZ, with the crime of CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about November 1, 1994, did unlawfully conspire with others to deliver a controlled substance, to-wit: heroin,

COUNT IV: And the Prosecuting Attorney, as aforesaid, further charges the defendant, GINO GONZAGA RODRIQUEZ, with the crime of CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or

about November 10, 1994, did unlawfully conspire with others to deliver a controlled substance, to wit: heroin,

COUNT V: And the Prosecuting Attorney, as aforesaid, further charges the defendants, GINO GONZAGA RODRIQUEZ and DEANNA MARIE TORGESON, with the crime of POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, committed as follows: That the defendants, GINO GONZAGA RODRIQUEZ and DEANNA MARIE TORGESON, in Spokane County, Washington, on or about November 10, 1994, did unlawfully possess, with intent to deliver, a controlled substance, to-wit: heroin,

COUNT VI: And the Prosecuting Attorney, as aforesaid, further charges the defendants, GINO GONZAGA RODRIQUEZ and DEBORAH ANN RYAN, with the crime of POSSESSION OF A CONTROLLED SUBSTANCE, committed as follows: That the defendants, GINO GONZAGA RODRIQUEZ and DEBORAH ANN RYAN, in Spokane County, Washington, on or about November 10, 1994, did unlawfully possess a controlled substance, to-wit: heroin,

COUNT VII: And the Prosecuting Attorney, as aforesaid, further charges the defendant, GINO GONZAGA RODRIQUEZ, with the crime of DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about January 10, 1995, did knowingly deliver a controlled substance, to-wit: heroin,

COUNT VIII: And the Prosecuting Attorney, as aforesaid, further charges the defendant, GINO GONZAGA RODRIQUEZ, with the crime of POSSESSION OF A

CONTROLLED SUBSTANCE, committed as follows: That the defendant, GINO GONZAGA RODRIQUEZ, in Spokane County, Washington, on or about January 10, 1995, did unlawfully possess a controlled substance, to-wit: heroin,

/s/ DIANNE G. DOUGHERTY *1602*
Deputy Prosecuting Attorney WA St. Bar ID#

STATEMENT OF INVESTIGATING OFFICER
AFFIDAVIT OF FACTS

[95-1-01071-8]
REPORT #: 94-85326
#95-01134

STATE OF WASHINGTON COUNTY OF SPOKANE

v.

RODRIGUEZ [*sic*], GINO G., M/M, [REDACTED],
TORGESON, DEANNA M., W/F [REDACTED],
RYAN, DEBORAH A., W/F [REDACTED]

[Filed: May 19, 1995]

The undersigned, a law enforcement officer, competent to testify, states as follows: that he/she believes a crime was committed by the above-named defendant/defendants in the City & County of Spokane, State of Washington, because:

In October and November of 1994 and January of 1995, the Spokane Police Department's Special Investigative Unit conducted a number of controlled substance activities in which defendant #1, GINO RODRIGUEZ [*sic*], was involved. Two cooperative individuals were utilized during these activities and had made prior purchases for SIU in which arrests had been made. Both individuals were searched before and after their involvement with the defendant and were found free of any unauthorized

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items or monies. A total of two search warrants were executed at [REDACTED] as a result of these activities involving the cooperative individuals and the defendant. A number of illegal drug-related substances and items were found during these search warrants and subsequently were identified as belonging to the defendant. As a result of these SIU activities, the defendant is charged with four counts of CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE (HEROIN & COCAINE), one count of POSSESSION OF A CONTROLLED SUBSTANCE (HEROIN) WITH INTENT TO DELIVER, and two counts of POSSESSION OF A CONTROLLED SUBSTANCE (HEROIN).

On 10/12/94, CI 94-071 under auspices of SPD telephoned #324-9124. This number was known to SIU as one of which to contact the defendant. It is noted that several other CI's had provided this same phone number on different occasions to SPD personnel as the number utilized to contact GINO RODRIGUEZ [*sic*] and make arrangements for drug transactions. A result of the CI's phone call was an arrangement to purchase cocaine and heroin from a unidentified white male known as "J." This subject was observed leaving the area of [REDACTED] and making contact with the CI at [REDACTED]. After a brief contact, the CI rejoined the control officer and immediately presented substances which appeared to be cocaine and heroin. "J" was followed by SPD surveillance to the area of [REDACTED] and was apparently seen entering the front door of that residence after the transaction. The substances which were purchased did field-test POSITIVE for cocaine and heroin. The CI also stated that the subject who made contact with him/her identified himself as "J" the sub-

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ject with whom the CI had agreed to make the purchase. This will hereafter be referred to as BUY #1.

On 11/1/94, CI 94-071 working with SIU again telephoned 324-9124 and arranged to purchase heroin and cocaine. An audio intercept authorization had been received and therefore this conversation was recorded. According to the CI, he/she did ask for GINO and that the defendant did get on the telephone and agreed to the CI's request to purchase heroin and cocaine. The CI did meet with a subject who identified himself as "DAN" in the area of [REDACTED]. This subject was observed by SIU surveillance leaving [REDACTED] and making contact with the CI and then returning to that residence after the transaction was completed. The substance purchased by the CI was presented to the control officer and did field-test POSITIVE for the presence of heroin, a controlled substance. This activity will hereafter be referred to as BUY #2.

On 11/10/94, CI 94-71 again telephoned 324-9124 and arranged to purchase heroin. The individual who answered this telephone call identified herself as "SHANNON". The CI did ask to speak with GINO and was told by SHANNON that he was "busy". Arrangements were made for the amount and location of the transaction. Upon reaching [REDACTED], the CI telephoned 324-9124 and was assured by whoever answered the telephone that SHANNON was "on her way". This subject was driving the same vehicle which had made the delivery in BUY #2 to this CI. This subject and the vehicle were observed leaving [REDACTED] and arriving at N.W. Blvd. and Maple. After the transaction was completed, surveillance followed the vehicle and suspect and observed her enter [REDACTED]. The substance

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which was purchased from this suspect did field-test POSITIVE for the presence of heroin. This activity will hereafter be referred to as BUY #3.

It is noted that a traffic stop was initiated on the vehicle which had been involved in BUYS NOS. 2 and 3, with the subsequent identification of one DANIEL MENDOSA and SHANNON I. TIMM. Ms. Timm was not in the vehicle at the time that it was stopped, however, Mr. MENDOSA was subsequently arrested for Delivery of a Controlled Substance (Heroin) as he was identified as the subject who had made the delivery to the CI in BUY #2.

A search warrant was obtained on 11/10/94 to search the defendant, one DEANNA M. TORGESON, at [REDACTED]. The warrant was executed and both subjects were present at the time of the warrant execution. In a search of the home, a quantity of suspected heroin was found in the bedroom utilized by Ms. TORGESON and RODRIGUEZ [*sic*]. With the physical evidence discovered and statements made by defendants RODRIGUEZ [*sic*] and TORGESON, both were subsequently arrested for Possession of a Controlled Substance (Heroin) With Intent to Deliver. Defendant #3, identified as DEBORAH A. RYAN, was also present when the warrant was executed and did, in fact, open the door when officers knocked. This defendant was observed throwing an item behind a television which was placed on the floor in the hallway. This item was later retrieved and found to be heroin, a controlled substance. Defendant RYAN did waive her constitutional rights and admitted that the heroin which had been seized belonged to her and that she had thrown it behind the television when officers made entry. She was subsequently arrested and booked

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for Possession of a Controlled Substance (Heroin). Also as a result of this search warrant, a quantity of heroin was found on defendant RODRIGUEZ'S [*sic*] person when he was transported to Jail by Corrections Officer Cepeda. That item was presented to Officer Hensley who gave it to Detective Boardman for placement on the Property Book. This item also field-tested POSITIVE for heroin and defendant RODRIGUEZ [*sic*] was additionally charged with Possession of a Controlled substance. This search warrant activity will be hereby referred to as Search Warrant #1.

On 1/10/95, Cooperative individual 95-003, under the guidance of SPD/SIU, contacted GINO RODRIGUEZ [*sic*] at [REDACTED]. The CI was working with another suspect in illicit drug sales, one DONALD BURNS, in making this transaction. During this activity, the CI presented DONALD BURNS with prerecorded currency to purchase heroin from defendant RODRIGUEZ [*sic*] at [REDACTED]. DONALD BURNS was observed entering and exiting that residence and traveling to [REDACTED]. The CI did contact defendant RODRIGUEZ [*sic*] at [REDACTED] to learn of DONALD BURNS' activities with that defendant as well as his location. This CI spoke with RODRIGUEZ [*sic*] and learned that he had sold one gram of heroin to DONALD BURNS and "fronted" another gram to BURNS to sell on RODRIGUEZ'S [*sic*] behalf and that BURNS intended to travel to [REDACTED]. This CI was transported to that area and did, in fact, make contact with DONALD BURNS and confirmed that he had two grams of heroin on his person, reportedly received from GINO RODRIGUEZ [*sic*]. The CI did receive approximately one gram of heroin from BURNS as prear-

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ranged and this did field-test POSITIVE for the presence of heroin. A search warrant was obtained later on this date of 1/10/95 for [REDACTED] to include DEANNA TORGESON, who was known to reside there and GINO RODRIGUEZ [*sic*]. Ms. TORGESON was present when the warrant was executed, however, RODRIGUEZ [*sic*] was not at that location. Paraphernalia and other drug-related items were seized during the search of the residence. One of those items was sent to the WSP Laboratory for testing and a POSITIVE result was received for heroin residue in one of the submitted items. Based on statements made by Ms. TORGESON during the search warrant, and the controlled buy activity previously on this date, it was determined that defendant RODRIGUEZ [*sic*] definitely had control of those items which were seized during the search warrant execution. Subsequently, he would be charged with Possession of a Controlled Substance (Heroin) and Conspiracy to Deliver a Controlled Substance (Heroin) based on the controlled substance buy earlier on this date and the heroin residue which was located in the residence also seized later on this date. This search warrant is hereby referred to as Search Warrant #2.

BUYS NO. 1, 2 and 3 and Search Warrant #1 are under SPD 94-085326 & Property #112099.

BUY #1: (10/12/94)

COOPERATIVE INDIVIDUAL 94-071 - Will testify that he/she, as well as his/her personal vehicle, was searched before and after the transaction and both were found clear of unauthorized items and/or monies. The CI will further testify to telephoning [REDACTED] and talking to a subject who identified himself as "J" to ar-

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range for the purchase of cocaine and heroin. The CI will further state that "J" indicated that he would travel to the location of [REDACTED] to make the delivery and would be traveling on a mountain bike. The CI will state that he/she arrived at the location and again telephoned [REDACTED] to insure that "J" was enroute to that location. The CI will testify that a female answered the phone and indicated that "J" had left the residence. The CI will also indicate that a white male, who identified himself as "J" to the CI, did arrive at the location and exchanged cocaine & heroin for prerecorded U.S. currency. The CI will then testify that he/she presented these substances to the control officer upon returning to the Public Safety Building and that on no occasion did he/she meet any person other than "J" during this transaction. The CI will also testify that he/she signed an authorization form, allowing for the recording of his/her conversations with subjects who answered [REDACTED].

DETECTIVE BOARDMAN - Will testify to searching the CI's vehicle before and after this transaction and to finding no unauthorized items or monies in that vehicle. This detective will also state that she witnessed the CI dial [REDACTED] and overheard the CI's part of the conversation whereby arrangements were made to purchase heroin & cocaine at [REDACTED]. She will also testify that she did receive an audio intercept authorization form, allowing for this recording. Detective Boardman will testify to surveiling the CI as he/she traveled from the Public Safety Building to N.W. Blvd. & Maple, as well as to observing the meeting between the CI and the suspect. Detective Boardman will further state that she followed the CI from this location to the Public

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Safety Building where he/she immediately handed Boardman two different packages, one containing cocaine and the other heroin.

DETECTIVE GRUMBLY - Will testify to observing a white male on a bicycle leaving the area of [REDACTED]. He will also testify to observing that same subject on the bicycle return to the area after the transaction was completed.

DETECTIVE WILLARD - Will testify to also observing the suspect "J" leave and then return to the area of [REDACTED] when the transaction occurred. He will also indicate that he field-tested the substance purchased and received a POSITIVE conclusion for cocaine and heroin, both being controlled substances. He will further state that he packaged, initialed and placed those items, as well as the audio tape, on the Property Book.

DETECTIVE McCABE - Will testify that he searched the CI before and after the transaction and found no unauthorized items of monies on his/her person. He will also clarify that he witnessed an exchange occur between the CI and "J" in the parking lot at [REDACTED]. He will further indicate that he assisted in surveillance of "J" on the bicycle to the area of [REDACTED].

SGT. SCHERES - Will testify to observing the contact between the CI and "J" at [REDACTED]. He will also state that he assisted in surveillance of "J" following the transaction from the location where it occurred to the area of [REDACTED]. He will also testify that he did observe a suspect walking a bicycle up the stairway inside [REDACTED] and to that subject looking like the

person he had followed from the transaction location to [REDACTED].

DETECTIVES HILL & QUIST - These detectives will testify to assisting in the trailing surveillance of the suspect from [REDACTED] to the transaction location and back to [REDACTED].

OFFICER McGREGOR - Will testify to transporting those items which were requested for Laboratory testing from the Spokane P.D. Property Room to the WSP Laboratory.

Buy #2:

CI 94-071 - Will testify to purchasing heroin on 11/1/94 after arranging to do so from defendant RODRIGUEZ [*sic*]. The CI will testify to telephoning [REDACTED] and to the authorization of that telephone call being recorded. He/she will state that he/she asked to speak to GINO and that that subject did get on the telephone and agreed to the purchase of heroin and cocaine by the CI. The CI will add that the location was designated as being [REDACTED]. This individual will also state that a second call was placed to [REDACTED] to solidify what was to be purchased and that at that time a male other than RODRIGUEZ [*sic*] answered the phone and indicated that RODRIGUEZ [*sic*] could not come to the phone as he was unavailable. The subject identified himself as "DAN and this individual solidified what was to be purchased. The CI will also testify to observing a police file photo of one DANIEL MENDOSA and to providing a tentative identification of that subject as the "DAN" who delivered to the CI on this date. The CI will further testify to arriving at the designated location and placing another call to [REDACTED] to learn that the

substance would be delivered within a short period of time. The CI will further state that he/she observed a dark colored Honda pull up next to his/her vehicle and to receiving an indication from DAN to enter that vehicle. The CI did enter the vehicle where the transaction occurred and exited it and returned to the Public Safety Building. The CI will state that he/she immediately presented the purchased substance to Detective Boardman who had surveiled him/her to the Public Safety Building.

DETECTIVE BOARDMAN - Will testify to receiving an audio intercept authorization to record the conversation between the CI and those subjects who answered [REDACTED]. This detective will testify to observing the CI dial [REDACTED] and hearing his/her end of the conversation during both calls made to that number at the Public Safety Building. She will further state that she surveiled the CI he/she traveled to the designated location and was contacted by a male subject in a dark colored Honda Civic. She will state that she observed the CI enter that vehicle, exit it and then leave the parking lot. Detective Boardman will further relate that she followed the CI, who had contact with no other individuals, back to the Public Safety Building and took possession of the purchased substance. She will further clarify that she conducted a field-test of the substance and received a POSITIVE conclusion for heroin, a controlled substance, after which time it was initialed, packaged and placed on the Property Book by her.

DETECTIVES McCABE & HILL - Will testify to conducting searches of the CI and his/her personal vehicle before and after the transaction and finding no unauthorized items or monies on their person or in their vehicle. They will also testify to assisting in the surveillance of

the suspect vehicle as it left [REDACTED], made contact with the CI and returned to [REDACTED]. They will also testify to providing the vehicle license number of the suspect vehicle as being [REDACTED].

DETECTIVE WILLARD - Will testify to assisting in this controlled activity, primarily in terms of maintaining a visual on the suspect house at [REDACTED]. He will state that following the transaction and after receiving a description of the suspect vehicle, he did observe this vehicle park in the area of [REDACTED] and that a male exited the vehicle and walked up on the porch of [REDACTED]. He will further clarify that although he did not observe this subject actually walk into the house, that he did observe the subject on the porch and that the door closed and no longer being able to see the suspect "DAN".

DETECTIVE GRUMBLY - Will testify to observing the subject, later identified as DANIEL MENDOSA, leave [REDACTED]. He will clarify that although he did not see MENDOSA enter a specific vehicle, he did notice in a timely fashion the illumination of headlights on a vehicle parked in front of the suspect residence and provided that information to other SIU surveillance who were abler to observe that vehicle and provide trialing [*sic*] surveillance of it.

SGT. YATES - Will testify to participating in this activity in a supervisory/surveillance capacity.

DETECTIVE JOHNSON - Will testify to transporting those items which were submitted for Laboratory testing from the SPD Property Room to the WSP Laboratory.

BUY #3:

C.I. 94-071 - Will testify to working with SPD/SIU on 11/10/94 to purchase controlled substances from defendant RODRIGUEZ [*sic*]. He/she will testify to calling telephone number [REDACTED] and to a female answering that telephone call. The CI will testify to asking for GINO and being advised that GINO was "busy". The CI will state that the female identified herself as "SHANNON" and that the CI did order heroin from SHANNON and agreed to meet her in the area of Maple & N.W. Blvd. The CI will testify that he/she did travel to that area and placed another telephone call to [REDACTED] and was advised that SHANNON was "on her way". The CI will testify that a female arrived in the same vehicle in which a delivery had been made by DANIEL MENDOSA on 11/1/94. The CI will clarify that eye contact was made with this female, later identified as SHANNON TIMM, and that the CI exited his/her vehicle and joined Ms. TIMM in the suspect vehicle where the transaction of prerecorded currency for heroin occurred. The CI will testify that he/she re-entered his/her own vehicle and was trailed to the Public Safety Building by Detective Boardman where the purchase substance was delivered to her. The CI will further clarify that on 11/11/94 he/she was shown a photograph of DANIEL MENDOSA to determine if that was the "DAN" of the purchase made on 11/1/94. The CI will testify that his/her response to the picture was "That looks like him". The CI indicated that at the time of the

delivery, that the suspect did not have glasses and that this changed the appearance of the suspect in the photo.

DETECTIVE BOARDMAN - Will testify to observing the CI dial [REDACTED] and talking to a subject who was subsequently identified as SHANNON TIMM. She will testify that she heard the CI arrange to purchase $50 worth of heroin in the area of Maple & N.W. Blvd. She will testify that she observed the contact between the CI and SHANNON TIMM when the latter drove into the area and drove to the CI's location. She will further testify that she searched the CI's vehicle before and after this transaction and found it clear of unauthorized items or monies. She will further state that she received the purchased substance from the CI after trailing him/her from the transaction location to the Pubilc Safety Building. She will further state that the substance was field-tested and was POSITIVE for the presence of heroin and at that time the detective packaged and initialed the substance, which was placed on the Property Book by Detective Hill.

LT. BRAUN - Will testify to assisting in surveillance during this controlled substance activity. He will further state that he assisted when patrol units stopped the suspect vehicle after it arrived at [REDACTED] following the transaction and then departed again with a male driver. He will report that he advised the driver, identified as DANIEL MENDOSA, of his constitutional rights at the time of the traffic stop and to that individual invoking his rights. He will testify that based on the buy on 11/1/94, that MENDOSA was arrested for Delivery of a Controlled Substance and booked into Jail.

DETECTIVE WILLARD - Will testify that upon observing DANIEL MENDOSA when the suspect vehicle was stopped by patrol that he positively identified him as the subject he had witnessed exit the suspect vehicle and walk onto the porch of [REDACTED] during BUY #2 on 11/1/94. He will also testify to assisting in surveillance of the CI and suspects in BUY #3.

DETECTIVE QUIST - Will testify to assisting in surveillance of the primary players during this controlled substance activity.

SGT. SCHERES - Will testify to providing surveillance assistance during this controlled substance activity, specifically as to observing SHANNON TIMM in the suspect vehicle leave the area of Maple & N.W. Blvd. and return to [REDACTED] where Ms. TIMM exited the vehicle and entered that residence.

DETECTIVE GRUMBLY - Will testify to searching the CI before and after this activity and to finding no unauthorized items or monies on his/her person.

DETECTIVE JOHNSON - Will testify to transporting those items that were submitted for Laboratory testing from the SPD Property Room to the WSP Laboratory.

SEARCH WARRANT #1:

DETECTIVE BOARDMAN - Will testify to seeking and obtaining a search warrant for [REDACTED] on 11/10/94. She will also testify that she assisted in making entry into that residence by knocking on the door. After receiving an answer from defendant RYAN who opened the door, Boardman did assist in announcing "Police, search warrant". She will further testify to interviewing defendant RYAN after being advised that

Detective Hill had provided her with Miranda warnings and that she had waived those rights. She will testify as to the results of that interview with Ms. RYAN, during which time she stated that she and her husband, JOHN RYAN, made daily stops to this residence to purchase heroin and cocaine from GINO RODRIGUEZ [*sic*]. She will also testify that Ms. RYAN admitted that she had thrown a small quantity of heroin wrapped in plastic behind a television located on the floor in the hallway. She will also advise that Ms. RYAN was placed under arrest for Possession of a Controlled Substance and booked into Jail on that charge. This detective will also state that during the time of this search warrant execution, she personally answered the telephone, with the number being [REDACTED], on three occasions in which the caller ordered heroin. On at least one of those occasions, Detective Boardman agreed to meet the caller in the vicinity to sell them $50 worth of heroin. (This meeting never occurred). During one of the other calls, the subject identified herself as "RENE" and the voice was familiar to this detective as belonging to one RENE CLINE, a subject on whom a search warrant had been executed in July of 1994 for controlled substance violations. This detective had knowledge that RENE CLINE and GINO RODRIGUEZ [*sic*] were at the very least associates in the distribution of controlled substances. This detective will also testify that Officer Hensley provided her with heroin that was found on GINO RODRIGUEZ'S [*sic*] person by Corrections Officer Cepeda at Jail. She will testify that based on the telephone calls and recorded conversations between the CI and GINO or his "runners" and as to the content of those conversations, and those "runners" who delivered the controlled substances entering and exiting [RE-

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DACTED], that GINO RODRIGUEZ [*sic*] was arrested for 8 counts of CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE (HEROIN & COCAINE), one count of POSSESSION OF A CONTROLLED SUBSTANCE, and an additional charge of POSSESSION OF A CONTROLLED SUBSTANCE (HEROIN) WITH INTENT TO DELIVER based on the packaging materials and amount of heroin found in GINO RODRIGUEZ'S [*sic*] bedroom pursuant to the search warrant.

DETECTIVE HILL - Will testify to making entry, utilizing the "knock and announce" rule with Detective Boardman when the search warrant was executed at [REDACTED]. He will further testify that he observed DEANNA TORGESON at the east window of the northeast bedroom, trying to open it when entry was taking place. He will further state that he found a syringe which contained a brown liquid on the floor of this bedroom, as well as a baggie which contained a substance that appeared to be heroin, on a desk in this same room. Also in this room, Detective Hill found a plate under the desk which contained brown particles that had the same consistency and appearance of heroin. Detective Hill will advise that he assisted in seizing this evidence and placing it with Detective Grumbly for Property Room storage. Detective Hill will clarify that DEANNA TORGESON was definitely in this room and within very close proximity to the syringe and other paraphernalia which was found in the room and on the bedroom window sill which it appeared she was trying to open when SPD announced itself for entry. This detective will advise that he read CR's to DEANNA TORGESON who invoked those rights and to GINO RODRIGUEZ [*sic*] who waived those rights. He will testify as to GINO

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RODRIGUEZ [*sic*] claiming that any drugs found in the house belonged to him. Detective Hill will also state that he advised DEBORAH RYAN of her constitutional rights and that she waived those rights. He will further state that defendant RYAN admitted to throwing the piece of plastic containing heroin behind the TV placed on the floor of the hall. He will also relate other information provided by defendant RYAN reference her activity in purchasing heroin from GINO RODRIGUEZ [*sic*] and in assisting Mr. RODRIGUEZ [*sic*] in the distribution of heroin and cocaine.

TIM DO - Will testify to working with SIU/SPD as an intern in the criminal law program offered by Eastern Washington University. He will testify that he accompanied SIU in the execution of the search warrant on 11/10/94 at [REDACTED]. He will further state that when entry was made, he did observe defendant RYAN throw an object behind a television which was on the floor of the entry hallway. He will state that he passed this information on to Officer Hensley as well as SIU detectives.

OFFICER HENSLEY - Will testify that TIM DO indicated that he had observed defendant RYAN throw an object behind the television. He will testify that that object was a small piece of heroin wrapped in cellophane. He will also testify that he transported GINO RODRIGUEZ [*sic*] to the Spokane County Jail and was present when Correction Officer Cepeda found a quantity of heroin wrapped in plastic in the left front pants pocket of GINO RODRIGUEZ [*sic*] pursuant to an administrative search. Officer Hensley will state that he took possession of this item and transported it to Detective Boardman at the SIU Office.

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DETECTIVE WILLARD - Will testify that he assisted in execution of the search warrant on 11/10/94 and as a perimeter unit, did observe defendant RODRIGUEZ [*sic*] at the east side window of the northeast bedroom at the time when the warrant was executed. He will also state the RODRIGUEZ [*sic*] held an item in his hand and appeared as though he was preparing to throw it out of the window. Detective Willard will state that he instructed defendant RODRIGUEZ [*sic*] to "Hold it" and that at that time RODRIGUEZ [*sic*] retreated from the window. Detective Willard will state that he assisted in the search of this bedroom and did observe what appeared to be heroin on a plate near a desk in that room, as well as small pieces of plastic containing what appeared to be heroin. He will also clarify that he seized dominion & control papers from this room, as well as the aforementioned evidentiary items, and presented them to Detective Grumbly and Detective Johnson for placement on the Property Book.

DETECTIVE QUIST - Will testify to assisting in execution of the warrant and to primarily handling the minor children that were present on the upstairs level of this house. He will testify to observing and seizing paraphernalia items, to include a beer can which was obviously used to smoke marihuana and it did, in fact, have residue on it. He will also testify that he did seize documents that contained telephone numbers and notes which were indicative of an accounting system with the numbers belonging to names that were familiar to SIU as being involved in drug distribution in Spokane.

LT. BRAUN - Will testify to removing a wallet from GINO RODRIGUEZ's [*sic*] person incident to arrest

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and to finding two of the prerecorded $20 bills on his person that were used during BUY # 3.

DETECTIVE McCABE - Will testify to seizing dominion & control papers which were located in the dining room indicating that RODRIGUEZ [*sic*] and TORGESON did reside at this residence. He will also testify to seizing a needle and substance which appeared to be heroin which had been thrown behind the television. Detective McCabe will testify that this item was field-tested and was POSITIVE for the presence of heroin. That detective will also state that he answered two telephone calls to this address, that number being [REDACTED], during which the callers asked to purchase controlled substances. He will specifically testify to the terminology utilized by those callers to indicate that was the purpose of the phone call.

SGT. SCHERES - Will testify that on his assignment as a perimeter unit when the warrant was being executed, that he did observe defendant RODRIGUEZ [*sic*] at the east window of the northeast bedroom appearing to attempt to throw something out of the window. He will further state that he secured dominion & control papers and insured that they were placed on the Property Book.

OFFICER McGREGOR - Will testify that he did take photographs of the residence and those present when the search was executed.

DETECTIVE JOHNSON - Will testify to assisting in execution of the search warrant, specifically in entering property onto the property sheet as officers seized it. He will also testify that he transported those items which were submitted for WSP Lab testing, from the SPD storage unit to the Property Room.

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BUY # 4 (SPD REPORT # 95-01134)

BUY # 4 (SPD REPORT # 95-01134)

PROPERTY #114587:

C.I. 95-003 - Will testify that he/she worked with

C.I. 95-003 - Will testify that he/she worked with SIU/SPD on 1/10/95 to purchase heroin from defendant RODRIGUEZ [*sic*] through an associate, DONALD BURNS. The CI will testify that he/she was searched before and after this activity and was clear of unauthorized items or monies. The CI will testify that he/she was transported to the area of Maple & Maxwell where he/she met with DONALD BURNS as was prearranged. The CI will further state that he/she walked with DONALD BURNS to the general location of [REDACTED] where the CI presented BURNS with prerecorded currency to purchase heroin from GINO RODRIGUEZ [*sic*] at [REDACTED]. The CI will testify that he/she had met GINO RODRIGUEZ [*sic*] at that address one day prior to this controlled substance activity. The CI will testify that after a period of time, he/she was contacted by the control officer who advised him/her that BURNS had been surveilled entering and leaving RODRIGUEZ'S [*sic*] house and going to another location. The CI will state that under direction of SIU/SPD, he/she contacted RODRIGUEZ [*sic*] at [REDACTED] to learn of BURNS' destination. The CI will testify that RODRIGUEZ [*sic*] advised him/her that BURNS had purchased one gram of heroin and been fronted a second gram to sell on RODRIGUEZ'S [*sic*] behalf. The CI will state that he/she saw approximately 40 grams of individually packed pieces of heroin in a small box located on an end table in the living room where RODRIGUEZ [*sic*]

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was lying on a couch. The CI will further testify that upon leaving RODRIGUEZ'S [*sic*] location, he/she was transported to [REDACTED] and made contact with BURNS who did eventually present him/her with one gram of heroin, reportedly purchased from GINO RODRIGUEZ [*sic*]. The CI will further state that he/she was shown a photo montage including GINO RODRIGUEZ [*sic*] in March of 1995. The CI will state that he/she was able to narrow the 6-pack down to two possible suspects, but was unable to positively identify RODRIGUEZ [*sic*], as he/she had not seen that individual since 1/10/95.

DETECTIVE BOARDMAN - Will testify that she conducted a search of the CI before and after this activity and found him/her clear of unauthorized items or monies. She will further state that she transported the CI to the general area of [REDACTED] and then to [REDACTED] where the transaction with BURNS was finally completed. The CI immediately returned to her and presented that detective with the purchased substance. Detective Boardman transported this substance to the Public Safety Building where Detective Quist conducted an inconclusive field-test. Detective Boardman packaged, initialed and transported the purchased item to the Property Room for storage. Detective Boardman will further state that she requested and obtained a search warrant for [REDACTED] based on BUY #4 and other activities which involved GINO RODRIGUEZ [*sic*] at this address. She will testify that she conducted an interview with DEANNA TORGESON who was present at the search warrant after Ms. TORGESON waived her constitutional rights. She will relate the results of that interview, specifically Ms. TORGESON's remark

that any drugs found in the residence would belong to GINO RODRIGUEZ [*sic*] as she was no longer using any controlled substances.

DETECTIVE QUIST - Will testify to assisting in surveillance of the controlled purchase involving the CI, DONALD BURNS and GINO RODRIGUEZ [*sic*]. He will testify to observing the initial meeting between the CI and BURNS in the area of Maple and Maxwell. He will also testify to assisting in the execution of the search warrant.

DETECTIVE BURBRIDGE - Will testify to assisting in execution of the search warrant and to finding specific drug paraphernalia in the residence. He will clarify the exact locations in which drug paraphernalia was found and seized, specifically a piece of cellophane/plastic which contained brown residue. This item was found in the kitchen cupboard. Detective Burbridge will advise that those items he found were presented to Detective Grumbly for placement on the Property Book.

SGT. YATES - Will testify that he assisted in the surveillance of the involved parties during the controlled substance buy. He will specifically state that he surveilled the CI and DONALD BURNS as they walked in the general area of [REDACTED]. He will further state that when advised by Detective Johnson that DONALD BURNS had left the residence at [REDACTED] and was westbound from that location on the bicycle, that he provided a trailing surveillance of BURNS and did witness him enter [REDACTED]. Sgt. Yates will testify that upon completion of the transaction at [REDACTED] between the CI and DONALD BURNS, that he then assisted in the execution of the

search warrant later on this date. He will testify tht he did answer the telephone on at least one occasion and received a request from an individual who identified himself as "JIM" for a quarter piece of heroin. Sgt. Yates will testify that "JIM" asked specifically for GINO but did agree to the deal with Sgt. Yates when advised that GINO was not available. He will further relate the results of that telephone call in that an exchange was made with a subsequent arrest.

DETECTIVE WILLARD - Will testify that he assisted in the surveillance during the controlled buy and did observe DONALD BURNS exit GINO RODRIGUEZ'S [*sic*] residence after the prerecorded currency had been fronted to him for the purchase of heroin by the CI. He will also testify to providing surveillance when the transaction was completed at [REDACTED]. Detective Willard will also state that he assisted in the execution of the warrant later on this date and did assist in the search of the residence. He will also indicate his role in the subsequent agreement to sell controlled substances to the subject who identified himself to Sgt. Yates as "JIM".

DETECTIVE JOHNSON - Will testify that he assisted in providing surveillance of the controlled substance buy. He will testify that he saw DONALD BURNS exit the yard of [REDACTED] on a bicycle after BURNS had received the prerecorded currency from the CI to contact GINO RODRIGUEZ [*sic*] at that address and purchase heroin. He will testify that he provided some trailing surveillance of BURNS as he traveled to 614 W. Sinto. Detective Johnson will also testify that when the CI contacted RODRIGUEZ [*sic*] at that address, that he

observed the CI enter and exit that residence when he/she had been released from the control vehicle.

DETECTIVE GRUMBLY - Will testify to assisting in surveillance of the controlled substance activity and also to the execution of the search warrant. He will testify that he logged seized property onto the property book during the search warrant activity and that he also accompanied Detective Boardman with the seized property to the Public Safety Building. He will testify that both detectives placed the relevant items to be tested in the appropriate packaging and transported it to the Property Room.

LT. BRAUN - will testify to assisting in surveillance of the controlled substance activity and specifically to assisting in the trailing surveillance of DONALD BURNS when he left [REDACTED] and traveled to [REDACTED].

WSP CHEMIST MELNIKOFF - Will testify to testing those items that were submitted under report #94-085326 and Property #112099. He will testify that in BUY #1, Item #1 contained heroin and Item #2 contained cocaine, both of which are controlled substances. He will also testify that he conducted the tests on Items Nos. 7 and 8 from BUY #3. He will relate that Item #7 contained heroin, a controlled substance, and that the residue from Item #8 was in insufficient amount to substantiate that it was heroin. This chemist will further testify that for BUY #4 and the subsequent search warrant, that he tested Items 17, 21, 36, and 37 and received a POSITIVE reading for heroin in all of those items.

WSP CHEMIST FORTNEY - Will testify that he tested Item #4 submitted for BUY #2. He will state that Item

#4 contained heroin, a controlled substance. He will also testify that he conducted the Laboratory tests for Item #1 submitted under report #95-001134 and Property #114587. He will testify that Item #1 did contain heroin, a controlled substance. (This would be considered BUY #4).

Chemist Fortney will also testify that he conducted Laboratory tests on those items submitted for Search Warrant #2 conducted on 1/10/95. He will indicate that Item #4 was the only item which tested POSITIVE and that it contained heroin residue.

I testify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. (9A.72.085)

Date: 4/21/95 PLACE: Spokane P.D.

SIGNATURE: /s/ LL BOARDMAN
LL BOARDMAN

[Gov't Exh. 8]

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01089-1

PA# 95-9-89758-4
RPT# 02-94-17171-0
RCW 69.50.401(a)D-F (#56002)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ, WM [REDACTED],
DEFENDANT(S)

[Filed: Nov. 21, 1995]

JUDGMENT AND SENTENCE
(FELONY)

I. HEARING

1.1 A sentencing hearing in this case was held: *11-16-95*
date

1.2 Present were:

Defendant: GINO GONZAGA RODRIQUEZ
Defendant's Lawyer: PAUL WASSON
Deputy Prosecuting Attorney:
DIANNE G. DOUGHERTY
Other:

1.3 The State has moved for dismissal of Count (s) __ _____.

1.4 Defendant was asked if there was any legal cause why judgment should not be pronounced, and none was shown.

II. FINDINGS

Based on the testimony heard, statements by defendants and/or victims, argument of counsel, the presentence report and case record to date, the court finds:

2.1 CURRENT OFFENSE (S): The defendant was found guilty on *11-16-95* by [plea] ~~[verdict] [jury] [non jury]~~ of:

Count No.: I Crime: DELIVERY OF A CONTROLLED SUBSTANCE NARCOTIC FROM SCHEDULE III-V
RCW 69.50.401(a)D-F (#56002)
Date of Crime March 29, 1994
Incident No. 02-94-17171-0

Count No.: __ Crime:_____
RCW _____
Date of Crime _____
Incident No _____

Count No. : __ Crime: _____
RCW _____
Date of Crime _____
Incident No. _____

( ) With a special verdict/finding for use of deadly weapon on Count (s): (RCW 9.94A.125)

( ) With a special verdict/finding of sexual motivation on Count (s): _____. (RCW 9.94A.127)

( ) with a special verdict/finding of RCW 69.50.401(a) violation in a school bus or within 1000 feet of a school bus route stop or 1000 feet of the perimeter of a school grounds. (RCW 69.50.435)

( ) Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400(1)):

( ) Additional current offenses attached in Appendix A.

2.2 CRIMINAL HISTORY: Criminal history used in calculating the offender score is (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Crime Type
PCS with intent Dist.	*current*	*A*	*11-10-94*	*drug*
DCS	"	*A*	*12-29-94*	*drug*
PCS	"	*A*	*1-10-95*	*drug*

( ) Additional criminal history is attached in Appendix B.

( ) Prior convictions served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)):

2.3 SENTENCING DATA:

	Offender Score	Seriousness Level	Range	Maximum Term
Count No. *I*	*7*	*IV*	*43-57 mons*	*10 years*
Count No. _	____	___	_____	_____
Count No. _	____	___	_____	_____

( ) Additional current offenses sentencing information is attached in Appendix C.

2.4 EXCEPTIONAL SENTENCE:

( ) Substantial and compelling reasons exist which justify a sentence (above) (below) the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. (RCW 9.94A.390)

2.5 CATEGORY OF OFFENDER: The defendant is:

(a) (x) An offender who shall be sentenced to confinement of over one year.

(b) ( ) An offender who shall be sentenced to confinement of one year or less.

(c) ( ) A first time offender who shall be sentenced under the waiver of the presumptive sentence range (RCW 9.94A.030(20), .120(5)).

(d) ( ) A sexual offender who is eligible for the special sentencing alternative and who shall be sentenced under the alternative

because both the defendant and the community will benefit from its use (RCW 9.94A.120(7)(a)).

(e) ( ) A felony sexual offender who shall be sentenced to confinement of over one year but less than six years and shall be ordered committed for evaluation of defendant's amenability to treatment (RCW. 9.94A.120(7)(b)).

(f) ( ) A persistent offender as defined in 9.94A.030(25) who shall be sentenced in accordance with 9.94A.120(4) to total confinement for life without the possibility of parole.

III. JUDGMENT

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the conditions set forth below.

4.1 The Court, having examined the defendant's ability to pay monetary obligations, makes the following findings:

(x) The defendant [does] **[does not]** have the present ability to pay toward financial obligation herein.

(x) There [is] [is not] a likelihood of the defendant having a future ability to pay toward financial obligations herein.

(x) Defendant shall pay the following legal financial obligation to the Clerk of the Court:

(a) $110.00, Court costs; (RCW 36.18.020(18))

(b) $100.00 Victim Assessment; (RCW 7.68.035)

(c) ( ) $_____, Restitution [per schedule to be filed];

( ) $_____, Restitution for emergency response of a public agency; to-wit:

(38.52);

( ) $_____, Restitution to

for costs of

extradition; (.94A.030(10)(25))

( ) (d) $ _____, Recoupment for attorney's fees;

(x) (e) $100.00 state crime laboratory fee for each offense for a total of $*100.00*. The crime(s) for which the defendant has been adjudged guilty herein involve(s) a state crime laboratory analysis. (RCW 43.43.690)

( ) Upon a verified petition by the defendant relating to his/her ability to pay

the fee, the court suspends $ ___ of said fee.

( ) (f) $125.00 state toxicology laboratory fee. (RCW 46.61.515)

( ) Upon a verified petition by the defendant relating to his/her ability to pay the fee, the court suspends $ _____ of said fee.

(✓) (g) $*1,000.00*, Fine; [ ] VUCSA additional fine waived due to indigency (RCW 69.50.430)

( ) (h) $ _____ Drug enforcement fund of ____. (RCW 69.50.520)

( ) (i) $ _____, Other costs for:

( ) The defendant (does) (does not) have the means to pay for the costs of incarceration.

( ) The defendant shall pay the costs of incarceration at the rate of $50.00 per day. (RCW 9.94A.145(2))

$ *1,310.00* , TOTAL legal financial obligations.

Commencing with the first full month after the date of this Judgment and Sentence or after release from confinement, the defendant shall pay not less than $ *set by DOC* per month, subject to adjustment by the court as necessary upon the recommendation of the community corrections officer, to the Clerk of the Court until the total legal financial obligation is paid in full (with credit for amounts paid by co-defendants), to be paid in full by *11/16/2005* with a report by the Department of Corrections to be submitted to the court by *11-16-2001*.

The Department of Corrections shall monitor all assets and earnings of the defendant while s/he is confined and shall deduct appropriate amounts to be forwarded to the Clerk of the Court to satisfy the court-ordered legal financial obligation as provided for herein.

Upon receipt, the Clerk of the Court shall distribute the restitution to:

( ) Schedule of restitution is attached as Appendix E.

( ) Schedule of Restitution to be filed.

( ) A notice of payroll deduction is to be immediately issued. (RCW 9.94A.145(3))

(✓) A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the defendant if a monthly court-ordered legal financial obligation payment is not paid when due, and an amount equal to or greater than the amount payable for one month is owed. (RCW 9.145A3)

The court shall retain jurisdiction over the defendant for the greater of ten (10) years, subject to the adjustment by the court, from the date of this Judgment and Sentence or from the defendant's last date of release from confinement pursuant to a felony conviction to assure payment of the above legal financial obligations. The defendant shall report to the Department of Corrections to monitor compliance, and obey conditions as provided by RCW 9.94A.120(12) and RCW 9.94A.94A.145. Provided further, the Department of Corrections shall assist the court in setting or modifying the minimum monthly sum, when necessary, by investigating and reporting to the court on the monthly amount the offender

should pay toward said legal financial obligation, considering the defendant's financial cirmstances, capabilities, and assets as determined under the provisions of RCW 9.94A.145.

( ) The defendant has been found guilty of an offense involving fraud or a deceptive practice and shall give notice of the conviction to the class of persons or sector of public affected or financially interested in the subject of the offense; to-wit: by mail, advertising or through the media as designated, to-wit:

4.3 CONFINEMENT OVER ONE YEAR: The defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commending *1 Nov*, 19*95*:

48 months for Count No. *I*

_____ months for Count No._____

_____ months for Count No. _____

( ) The terms in Counts No. _____ to be concurrent for a total term of _____ months.

( ) The terms in Counts No. _____ to be consecutive for a total term of _____ months.

(✓) The sentence herein to run **(concurrently)** (consecutively) with the sentence in *95-1-01070-0, 95-1-01071-8*
(Count(s) or cause number(s))

(✓) Credit be given for (time) (*170* days) served solely on these charges.

( ) Confinement in a work ethic camp is recommended if defendant is eligible. (RCW 9.94A.137).

( ) Upon completion of the Work Ethic Camp, defendant shall be released on community custody for any remaining time of total confinement.

(✓) The defendant is sentenced to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of earned early release, according to the conditions set out in Appendix G.

( ) This being a [sex offense] [serious violent offense] committed on or after July 1, 1990, the defendant is sentenced to community placement for two (2) years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, beginning either upon completion of the term of confinement or at such time the defendant is transferred to community custody in lieu of earned early release, according to the conditions set out in Appendix G.

( ) The defendant, having been convicted of a felony sex offense, shall register with the County Sheriff where the defendant resides within twenty-four (24) hours of release from confinement and/or placement on community supervision as a convicted sex offender.

4.4 (✓) Pursuant to RCW 70.24.340 the defendant shall submit to HIV testing as soon as possible,

be provided pre-test counseling and be provided post-test counseling for the reason that:

( ) The offense herein is a sexual offense under RCW 9A.44.

( ) The offense herein is a prostitution offense or related to prostitution under RCW 9A.88.

( ) The offense herein is a drug offense under RCW 69.50 and it is determined by the court that the related drug offense is one associated with the use of hypodermic needles.

Provided further the results of the HIV test are to be confidential but are to be provided to the victim, prosecuting attorney, community corrections officer and the public defender as necessary.

4.5 ( ) Pursuant to RCW 43.43.754, the defendant shall have a blood sample drawn for purposes of DNA identification analysis prior to his/her release from a department of corrections facility, this conviction being for:

( ) A felony defined as a sex offense under RCW 9.94A.030(29)(a).

( ) A violent offense as defined under RCW 9.94A.030(32).

The following appendices are attached to this Judgment and Sentence and are incorporated by reference:

(✓) Appendix A, Understanding of Defendant's Criminal History

( ) Appendix B, Additional Criminal History

( ) Appendix C, Understanding of Defendant's Criminal History

( ) Appendix D, Findings of Fact and Conclusions of Law for Exceptional Sentence

( ) Appendix E, Schedule of Restitution

( ) Appendix F, Additional Conditions

(✓) Appendix G, Conditions of Community Placement

( ) Appendix H, Order Prohibiting Contact

( ) Appendix I, Notification of Registration Requirement

(x) Appendix J, Advice of Time Limit for Filing Collateral Relief

Date: *11/16/95*

/s/ TARI S. EITZEN
Judge TARI S. EITZEN
Approved as to form:

Presented by:

/s/ DIANNE G. DOUGHERTY
DIANNE C. DOUGHERTY
Deputy Prosecuting Attorney
WA State Bar ID #: *16021*

/s/ PAUL WASSON
PAUL WASSON
Lawyer for Defendant
WA State Bar ID #: *5854*

FINGERPRINTS

Right Hand
Fingerprints of:

GINO GONZAGA RODRIQUEZ

ADDRESS:

Attested by:

THOMAS R. FALLQUIST, County Clerk

By: , deputy

Dated:

By:

CERTIFICATE

I, _____
Clerk of this Court, certify that the above is a true copy of the Judgment and Sentence in this action on record in my office.

Dated: _____

_____
Clerk

By: _____
Deputy Clerk

OFFENDER IDENTIFICATION

S.I.D. NO. 14653368
Date of Birth 07 26 62
Sex MALE
Race WHITE
ORI WA032013A
OCA 150616
OIN 02-94-17171-0
DOA 05 18 95

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01089-1

PA# 95-9-89758-4
RPT# 02-94-17171-0
RCW 69.50.401(a)D-F (#56002)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ, WM [REDACTED],
DEFENDANT(S)

[Filed: Nov. 21, 1995]

STATEMENT OF DEFENDANT ON PLEA OF GUILTY TO A FELONY

I. STATEMENT OF DEFENDANT

1. My true name is *Gino G. Rodriquez*. I am also known as *n/a* _____.
2. My age is *33*. Date of birth [REDACTED] _____.
3. I went through the _____ grade.
4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:
   (a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer,

one will be provided at no expense to me. My lawyer's name is PAUL WASSON.

(b) I am charged with the crime(s) of: DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V, and the elements of the crime(s) are: *In Spokane, Washington, knowingly delivered a narcotic*.

5. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself.

(c) The right at trial to hear and question witnesses who testify against me.

(d) The right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed innocent until the charge is proven beyond a reasonable doubt, or I enter a plea of guilty.

(f) The right to appeal certain pretrial court decisions and any determination of guilt after trial.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) The crime with which I am charged carries a maximum sentence of ___ years imprisonment and a $ *20,000* fine. The standard sentence range is from *43* months to *57* months confinement, based on the prosecuting attorney's understanding of my criminal history.

(b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes convictions in juvenile court for felonies or serious traffic offenses that were committed when I was 15 years of age or older. Juvenile convictions, except those for class A felonies, court only if I was less than 23 years old when I committed the crime to which I am now pleading guilty.

(c) The prosecuting attorney's statement of my criminal history is attached to this agreement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard range and the prosecuting attorney's recommendation increase.

(e) In addition to sentencing me to confinement for the standard range, the judge will order me to pay $ *100* as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs and attorney fees. Furthermore, the judge may place me on community supervision, impose restrictions on my activities, and order me to perform community service.

(f) The prosecuting attorney will make the following recommendations to the judge: *Amend this information; dismiss several other counts; allow me to ask for low end of SRA range and ask for a furlough.*

(g) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the court finds substantial and compelling reasons not to do so. If the court goes outside

the standard range, either I or the State can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

* * * * *

7. I plead *guilty* to the crime(s) of DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM SCHEDULE III-V, as charged in the [Amended] information. I have received a copy of that Information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime. This is my statement: *I am charged with several counts in 3 separate informations. There are facts in there to convict me on some counts.*

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

/s/ GINO RODRIQUEZ
GINO RODRIQUEZ
Defendant

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

/s/ DIANNE G. DOUGHERTY
DIANNE G. DOUGHTERY
DEPUTY PROSECUTING ATTORNEY
WA State Bar ID #: *1602*

/s/ PAUL WASSON
PAUL WASSON
DEFENDANT'S LAWYER
WA State Bar ID # *5854*

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]

☒ the defendant had previously read

or

☐ the defendant's lawyer had previously read to him or her

or

*☐ an interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently, and voluntarily made. Defendant understands the charge and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated this *16* day of *Nov.*, 19*95*

/s/ TARI S. EITZEN
Judge TARI S. EITZEN

* I am a certified interpreter or have been found otherwise qualified by the court to interpret in the _____ language which the defendant understands, and I have translated this entire document for the defendant from English into that language. The defendant has acknowledged his/her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this _____ day of _____, 19 _____.

_____

INTERPRETER

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01089-1
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney

PA# 95-9-89758-4
RPT# 02-94-17171-0
RCW 69.50.401(a)D-F (#56002)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ WM [REDACTED],
DEFENDANT(S)

[Filed: Nov. 21, 1995]

AMENDED INFORMATION

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crimes(s):

DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendants, GINO GONZAGA RODRIQUEZ AND BYRON LESLIE GRENDAHL, in Spokane County, Washington, on or about March 29, 1994, did knowingly deliver a controlled substance, to-wit: a narcotic from Schedule III-V,

/s/ DIANNE G. DOUGHTERY
DIANNE G. DOUGHTERY
Deputy Prosecuting Attorney

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

No. 95-1-01089-1
DIANNE G. DOUGHERTY
Deputy Prosecuting Attorney

PA# 95-9-89758-4
RPT# 02-94-17171-0
CT I & III: 69.50.401(a)D-F (#56002)
CT II & IV: 69.50.401(a) DCO-F
(69.50.407) (#56610)
CT V: 69.50.401(c)-F (#56609)
CT VI: 69.53.010-F (#56951)
CT VII-VIII: 69.50.401(d)-F (#56603)
(RODRIQUEZ CT I ONLY)
(B. GRENDAHL CT I & III ONLY)
(W. GRENDAHL CT II, IV & V ONLY)
(NORTON CT III ONLY)
(A. GRENDAHL CT. VI-VIII ONLY)

STATE OF WASHINGTON, PLAINTIFF

v.

GINO GONZAGA RODRIQUEZ WM [REDACTED],
BRYON LESLIE GRENDAHL WM [REDACTED]
WARD GALEN GRENDAHL WM [REDACTED]
ROY MADISON NORTON, SR. WM [REDACTED]
ARLENE MAXINE GRENDAHL WF [REDACTED],
DEFENDANT(S)

[Filed: June 6, 1995]

INFORMATION

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendants, GINO GONZAGA RODRIQUEZ AND BYRON LESLIE GRENDAHL, in Spokane County, Washington, on or about March 29, 1994, did knowingly deliver a controlled substance, to-wit: heroin,

COUNT II: And the Prosecuting Attorney, as aforesaid, further charges the defendant, WARD GALEN GRENDAHL, with the crime of CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, committed as follows: That the defendant, WARD GALEN GRENDAHL, in Spokane County, Washington, on or about March 29, 1994, did unlawfully conspire with others to deliver a controlled substance, to wit: heroin,

COUNT III: And the Prosecuting Attorney, as aforesaid, further charges the defendants BYRON LESLIE GRENDAHL and ROY MADISON NORTON, SR., with the crime of DELIVERY OF A CONTROLLED SUBSTANCE, committed as follows: That the defendants, BYRON LESLIE GRENDAHL and ROY MADISON NORTON, SR., in Spokane County, Washington, on or about March 30, 1994, did knowingly deliver a controlled substance, to wit: heroin,

COUNT IV: And the Prosecuting Attorney, as aforesaid, further charges the defendant, WARD GALEN GRENDAHL, with the crime of CONSPIRACY TO DELIVER A CONTROLLED SUBSTANCE, committed as follows: That the defendant, WARD GALEN GRENDAHL, in Spokane County, Washington, on or

about March 30, 1994, did unlawfully conspire with others to deliver a controlled substance, to wit: heroin,

COUNT V: And the Prosecuting Attorney, as aforesaid, further charges the defendant, WARD GALEN GRENDAHL, with the crime of DELIVERY OF A SUBSTANCE IN LIEU OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, WARD GALEN GRENDAHL, in Spokane County, Washington, on or about April 6, 1994, did unlawfully offer, arrange and negotiate the delivery of a controlled substance, to wit: heroin, to another person, and did give and deliver to such person another substance in lieu of the controlled substance,

COUNT VI: And the Prosecuting Attorney, as aforesaid, further charges the defendant, ARLENE MAXINE GRENDAHL, with the crime of USE OF A BUILDING FOR UNLAWFUL DRUG PURPOSES, committed as follows: That the defendant, ARLENE MAXINE GRENDAHL, in Spokane County, Washington, on or about April 8, 1994, then and there being, did knowingly allow a building located at [REDACTED], which was under his/her management and control as a lessee, to be used for the unlawful purpose of delivering, selling and storing controlled substance, to wit: heroin,

COUNT VII: And the Prosecuting Attorney, as aforesaid, further charges the defendant, ARLENE MAXINE GRENDAHL, with the crime of POSSESSION OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, ARLENE MAXINE GRENDAHL, in Spokane County, Washington, on or about April 8, 1994, did unlawfully possess a controlled substance, to wit: heroin,

COUNT VIII: And the Prosecuting Attorney, as aforesaid, further charges the defendant, ARLENE MAXINE GRENDAHL, with the crime of POSSESSION OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, ARLENE MAXINE GRENDAHL, in Spokane County, Washington, on or about April 8, 1994, did unlawfully possess a controlled substance, to wit: cocaine,

/s/ DIANNE G. DOUGHTERY
DIANNE G. DOUGHTERY
Deputy Prosecuting Attorney
WA St. Bar ID # *16021*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

Court No. 6271

PEOPLE OF THE STATE OF CALIFORNIA

v.

GINO GANZAGA RODRIGUEZ [*sic*], DEFENDANT

[Filed: Nov. 14, 1980]

COMMITMENT TO THE YOUTH AUTHORITY (CRIMINAL)

To the Youth Authority of the State of California:

1. On *October 17*, 19*80*, the person named in this matter was convicted of the following crime(s):

   a. *Burglary* *1* count(s), *second*
   (Burglary arson, etc.) (Number) (degree)
   thereby violating Section *459*, *California Penal Code*.
   (Number)
   (Title of Code or Statute)

   b.

   c.

   d.

2. This person was less than 21 years of age at the time of apprehension *4th* day of *January*, 19*80*, for the above crime(s).

3. The mental and physical condition and qualifications of this person are such as to render it probable that he will be benefited by the reformatory and educational discipline or other treatment provided by the Youth Authority.

THEREFORE, the person named in this matter is hereby committed to the Youth Authority of the State of California for xxxxxxxxxxx two (2) years to be served concurrent with any sentence presently being served.

Dated *Nov. 14 1980*, 19 __ /s/ ILLEGIBLE
Judge

CERTIFICATION

I hereby certify that the foregoing is a correct copy of the original on file in my office.

Date_____, 19__, _____,Clerk

[SEAL] By _____
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

Court No. 6271

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

GINO RODRIGUEZ [*sic*], DEFENDANT

[Sept. 19, 1980]

AMENDED
INFORMATION

The District Attorney of the County of Kings hereby accuses GINO RODRIGUEZ [*sic*] of a felony, in that on or about the 4th day of January, 1980, at and in the Hanford Judicial District, County of Kings, State of California, the said defendant did commit a FELONY, namely: violation of Section 459 of the Penal Code of the State of California, in that the said defendant did willfully, unlawfully and feloniously, in the nighttime, enter the inhabited dwelling house of Ernest Filippi located at [REDACTED], with intent to commit theft.

COUNT II

AS A DIFFERENT STATEMENT OF THE SAME CAUSE OF ACTION SET FORTH IN COUNT I ABOVE, the said defendant, did in the above Judicial District, County of Kings, State of California on or about January 4, 1980, commit a(n) FELONY, namely:

violation of Section 496.1 of the Penal Code of the State of California, in that the said defendant did willfully, unlawfully and feloniously receive and conceal and withhold certain property, to wit, television and stereo equipment, which property had been stolen, knowing the same to have been stolen.

Dated this 19th day of September, 1980.

ROBERT R. MALINE
District Attorney

By /s/ PETER M. SCHULTZ
PETER M. SCHULTZ
Assistant District Attorney

[SEAL OMITTED]

This document in which this certificate is affixed is a full, true and correct copy of the original on file and of record in my office

[ILLEGIBLE] *5-21-04*

By /s/ ILLEGIBLE Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

No. 6271

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

Date: [illegible], 1980

Judge: Hon. Robert R. Rosson
Reporter: ~~William J. Quilty~~/Victoria L. McNutt
Clerk: Verla R. Crawford
Bailiff: Bill Landis
District Attorney: Robert R. Maline
by Arthur Markham Deputy
Counsel for Defendant: Wayne Hardcastle
Deputy Probation Officer: *Robert Carney*

( ) ARRAIGNMENT (x) CONTINUED ARRAIGNMENT
( ) PRE-TRIAL DISPOSITION
( ) TRIAL READINESS HEARING
( ) FELONY (In ___ Counts) to wit:
( ) MISDEMEANOR

PEOPLE REPRESENTED AS STATED ABOVE: DEFENDANT PRESENT WITH/~~WITHOUT~~ COUNSEL

( ) Defendant ( ) Counsel handed certified copy of ( ) Information ( ) Indictment ( ) _____

( ) Defendant stated true name as shown ( )_____

( ) Clerk read ( ) Information ( ) Indictment ( ) Order Certifying to Superior Court

( ) Court ( ) advised defendant of legal rights, including right to an attorney ( ) defendant wants attorney but has no money to hire one ( ) defendant waives right to an attorney ( ) waives being further advised of legal rights ( ) Court appoints_____

( ) Attorney ( ) present in Court and accepts the appointment ( ) requests a continuance ( ) to study transcript ( ) to make a Motion ( )

( ) Defendant, through counsel moves to set aside Information under Section 995 P.C.

( ) Declaration of defendant and counsel accepted and filed

(✓) Defendant ( ) withdraws plea of_____ ( ) plead guilty as charged in Count __( ) plead guilty of the lesser offense of _____(✓) plead not guilty as to Count ___ ( ) plead guilty by reason of insanity ( ) pleads nolo contendre ( ) waives time to plead

( ) Defendant advised of legal rights and waived same regarding change of plea

( ) Defendant: ( ) admits ( ) denies prior convictions of ( ) felony ( ) being armed

( ) District Attorney requested case be dismissed in the interest of justice

( )

( )

COURT:

( ) ordered matter to be continued to _____ at 8:15 a.m.

() fixed bail at $_____ ( ) fixed the degree of the offense at _____ degree

( ) suspended criminal proceedings and certified matter to civil court, and ( ) appointed Drs. _____ to examine the defendant to determine if he/she is ____ and continued the matter to _____ at 8:15 a.m. _____

( ) certified the defendant back to Criminal Court

( ) suspended proceedings on ground defendant is a minor defendant certified to Juvenile Court

(✓) defendant waived statutory time for *Trial*

(✓) set case for trial on *Oct. 12, 1980* Jury (✓) demanded ( ) waived

( ) referred matter to probation office for report and recommendation and continued matter to _____ for hearing on said report and for sentencing

( ) ordered defendant ( ) remain at liberty on the bail previously posted ( ) be released on own recognizance ( ) remain in custody ( ) be released from custody

( ) ordered case be dismissed as requested ( ) ordered bail be exonerated ( ) ordered trial dates be vacated

(✓) pre-trial conference set for *April 30 1980*

(✓) pre-trial disposition set for *May 7, 1980*

(✓) trial readiness hearing set for *Sept. 19, 1980*

( ) ordered trial dates be confirmed

( )

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

No. 6271

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

Date: Sept. 23, 1980

Judge: Hon. Charles W. Jennings
Reporter: William J. Quilty/Victoria L. McNutt
Clerk: Beatrice L. Worley
Bailiff: Lee Reynolds
District Attorney: Robert R. Maline
by/s/ PETER ILLEGIBLE, Deputy
Counsel for Defendant: Wayne Hardcastle
Deputy Probation Officer: *Glenda Fuji*

( ) ARRAIGNMENT ( ) CONTINUED ARRAIGNMENT
( ) PRE-TRIAL DISPOSITION
(x) TRIAL READINESS HEARING
( ) FELONY (In ___ Counts) to wit:
(x) MOTION TO FILE AMENDED INFORMATION and
( ) MISDEMEANOR

PEOPLE REPRESENTED AS STATED ABOVE: DEFENDANT PRESENT WITH/WITHOUT COUNSEL

Amended

(✓) Defendant ( ) Counsel handed certified copy of (✓) Information ( ) Indictment ( ) _____

( ) Defendant stated true name as shown ( )_____

(✓) Clerk read (✓) Information ( ) Indictment ( ) Order Certifying to Superior Court

( ) Court ( ) advised defendant of legal rights, including right to an attorney ( ) defendant wants attorney but has no money to hire one ( ) defendant waives right to an attorney ( ) waives being further advised of legal rights ( ) Court appoints_____

( ) Court appoints _____

( ) Attorney ( ) present in Court and accepts the appointment ( ) requests a continuance ( ) to study transcript ( ) to make a Motion

( ) Defendant, through counsel moves to set aside Information under Section 995 P.C.

( ) Declaration of defendant and counsel accepted and filed

( ) Defendant ( ) withdraws plea of _____ ( ) plead guilty as charged in Count____ ( ) plead guilty of the lesser offense of ____(✓) plead not guilty as to Count _2__ ( ) plead not guilty by reason of insanity ( ) pleads nolo contendre ( ) waives time to plead

( ) Defendant: ( ) admits ( ) denies prior convictions of ( ) felony ( ) being armed

( ) District Attorney requested case be dismissed in the interest of justice
(✓) *A amended information illegible*
(✓) *Defendant illegible advising of constitutional*

COURT:
( ) ordered matter to be continued to _____at 8:15 a.m. _____
( ) fixed bail at $____ ( ) fixed the degree of the offense at _____degree
( ) suspended criminal proceedings and certified matter to civil court, and ( ) appointed Drs._____to examine the defendant to determine if he/she is ____ and continued the matter to _____ at 8:15 a.m. _____
( ) certified the defendant back to Criminal Court
( ) suspended proceedings on ground defendant is a minor, defendant certified to Juvenile Court
( ) defendant waived statutory time for_____
( ) set case for trial on ___Jury ( ) demanded ( ) waived
( ) referred matter to probation office for report and recommendation and continued matter to _____ for hearing, on said report and for sentencing
( ) ordered defendant ( ) remain at liberty or, the bail previously posted ( ) be released on own recognizance ( ) remain in custody ( ) be released from custody
( ) ordered case be dismissed as requested ( ) ordered bail be exonerated ( ) ordered trial dates be vacated
() pre-trial conference set for_____
( ) pre-trial disposition set for _____
( ) trial readiness hearing set for _____

( ) ordered trial dates be confirmed
(✓) *Motion granted to file amended information granted*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

No. 6271

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

Date: Oct. 17, 1980

Judge: Hon. Charles W. Jennings
Reporter: ~~William J. Quilty~~/Victoria L. McNutt
Clerk: Verla R. Crawford
Bailiff: Lee Reynolds
District Attorney: Robert R. Maline
by/s/ PETER ILLEGIBLE, Deputy
Counsel for Defendant: Wayne Hardcastle
Deputy Probation Officer: *Roberty Carney*

( ) ARRAIGNMENT ( ) CONTINUED ARRAIGNMENT
( ) PRE-TRIAL DISPOSITION
(x) TRIAL READINESS HEARING
( ) FELONY (In ___ Counts) to wit:
( ) MISDEMEANOR

PEOPLE REPRESENTED AS STATED ABOVE: DEFENDANT PRESENT WITH/~~WITHOUT~~ COUNSEL

( ) Defendant ( ) Counsel handed certified copy of ( ) Information ( ) Indictment ( ) _____

( ) Defendant stated true name as shown ( )_____

( ) Clerk read ( ) Information ( ) Indictment ( ) Order Certifying to Superior Court

( ) Court ( ) advised defendant of legal rights, including right to an attorney ( ) defendant wants attorney but has no money to hire one ( ) defendant waives right to an attorney ( ) waives being further advised of legal rights ( ) Court appoints_____

( ) Court appoints _____

( ) Attorney ( ) present in Court and accepts the appointment ( ) requests a continuance ( ) to study transcript ( ) to make a Motion

( ) Defendant, through counsel moves to set aside Information under Section 995 P.C.

(✓) Declaration of defendant and counsel accepted and filed

(✓) Defendant (✓) withdraws plea of *not guilty* (✓) plead guilty as charged in Count *1 in* ( ) plead guilty of the lesser offense of ____( ) plead not guilty as to Count *Amended Information* ( ) plead not guilty by reason of insanity ( ) pleads nolo contendre ( ) waives time to plead

( ) Defendant: ( ) admits ( ) denies prior convictions of ( ) felony ( ) being armed

( ) District Attorney requested case be dismissed in the interest of justice

( )

( )

COURT:

( ) ordered matter to be continued to _____at 8:15 a.m. _____

( ) fixed bail at $_____ (✓) fixed the degree of the offense at *second* degree

( ) suspended criminal proceedings and certified matter to civil court, and ( ) appointed Drs._____to examine the defendant to determine if he/she is ____ and continued the matter to _____ at 8:15 a.m. _____

( ) certified the defendant back to Criminal Court

( ) suspended proceedings on ground defendant is a minor, defendant certified to Juvenile Court

(✓) defendant waived ~~statutory time for~~ *right to apply for probation*

( ) set case for trial on ___Jury ( ) demanded ( ) waived

( ) referred matter to probation office for report and recommendation and continued matter to _____ for hearing, on said report and for sentencing

( ) ordered defendant ( ) remain at liberty or, the bail previously posted ( ) be released on own recognizance ( ) remain in custody ( ) be released from custody

( ) ordered case be dismissed as requested ( ) ordered bail be exonerated (✓) ordered trial dates be vacated

() pre-trial conference set for_____

( ) pre-trial disposition set for _____

( ) trial readiness hearing set for _____

( ) ordered trial dates be confirmed

(✓) *Order def be sentenced to CYA for medium term to be served concurrent with sentence now serving*

BEST AVAILABLE COPY

ABSTRACT OF JUDGMENT – COMMITMENT

FILED
NOV 24 198
JOAN L. [illegible]
KINGS COUNTY, CA
By [illegible] DEPU

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Kings
BRANCH

COURT I.D. 16

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: GINO G. RODRIGUEZ
AKA:

[X] PRESENT [ ] NOT PRESENT

CASE NUMBER(S): 6891 - A; - B; - C; - D; - E

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT [ ] AMENDED ABSTRACT

DATE OF HEARING (mo) (day) (yr)	DEPT. NO.	JUDGE	CLERK
11 23 82	1	Larry G. McKee	Mary Lou Chase

REPORTER	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO. OR
William Quilty	Michael Woodbury	Arthur Markham	Tona Sal

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES:

a. [ ] ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT

COUNT	CODE	SECTION NUMBER	CRIME	DATE OF CRIME (mo day yr)	CONVICTION BY COURT	CONVICTION BY JURY	CONVICTION BY PLEA	SENTENCE
1	PC	459	enter to theft	82 10 26 82		X	11	

2. ENHANCEMENTS (CHARGED AND FOUND, STRICKEN, TIME IMPOSED):

COUNT	12022(a)	12022(b)	12022.5(a)	12022.5(b)	12022.6	12022.7(a)	12022.7(b)	12022.7	12022.8
	C/P S I	C/P S I	C/P S I	C/P S I	C/P S I	C/P S I	C/P S I	C/P S I	C/P S I

3. UNCOMPLETED SENTENCES (a) CONSECUTIVE:

COUNT	CASE NUMBER	CREDIT FOR TIME SERVED

4. OTHER ORDERS:

5. a. NUMBER OF PRIOR PRISON TERMS:

0	C/P	0	1
667.5(a)			
667.5(b)			
667.6(b)			

b. NUMBER OF PRIOR FELONY CONVICTIONS:

0	C/P	0	1
667.5(a)			

6. TOTAL TIME IMPOSED ON ALL ATTACHMENT PAGES (FORM DEL 250A):

7. TIME STAYED 1170.1(a) (HYBRID LIMIT) AND/OR 1170.1(f) (DOUBLE BASE LIMIT):

8. TOTAL TERM IMPOSED:

9. EXECUTION OF SENTENCE IMPOSED:

a. [X] AT INITIAL SENTENCING HEARING
b. [ ] AT RESENTENCING PURSUANT TO DECISION ON APPEAL
c. [ ] AFTER REVOCATION OF PROBATION
d. [ ] AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT

10. DATE SENTENCE PRONOUNCED: 11 23 82

CREDIT FOR TIME SPENT IN CUSTODY:	TOTAL DAYS: 141	INCLUDING: ACTUAL DAYS: 94	LOCAL CONDUCT DAYS: 47	GOOD TIME/WORK TIME
				[ ] DAYS

11. DEFENDANT IS DELIVERED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:

[X] FORTHWITH
[ ] AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS
INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:
[ ] CALIF. INSTITUTION FOR WOMEN – FRONTERA
[X] CALIF. MEDICAL FACILITY – VACAVILLE
[ ] OTHER (SPECIFY):

CLERK OF SUPERIOR COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action

DEPUTY'S SIGNATURE NOV 24 1982 Mary Lou Chase

This form is prescribed pursuant to Penal Code §1213.5. To satisfy the requirements of Penal Code §1213 (Abstract of Judgment and Commitment sentences under Penal Code §1170. A copy of probation report shall accompany the Department of Corrections' copy of this form pursuant to Pe A copy of the underlying proceedings and any supplemental probation report shall be transmitted to the Department of Corrections pursu §1203.01. Attachments may be used but must be incorporated by reference.

Form Adopted by the Judicial Council of California
Effective July 1, 1981

ABSTRACT OF JUDGMENT – COMMITMENT
FORM DEL 250

DISTRIBUTION: WHITE COPY – COURT FILE. YELLOW COPY – DEPARTMENT OF CORRECTIONS. PINK COPY – ADMINISTRATIVE OFFICE
CAC 2b

129

odriquez SFR

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

No. 6891

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF

v.

RENEE ROSE APODACA, AND GINO G. RODRIGUEZ
[*sic*], DEFENDANTS

[Filed: Sept. 22, 1982]

INFORMATION

The District Attorney of the County of Kings hereby accuses RENEE ROSE APODACA and GINO G. RODRIGUEZ [*sic*] of a felony, in that on or about the 20th day of August, 1982, at and in the Hanford Judicial District, County of Kings, State of California, the said defendants did commit a FELONY, namely: violation of Section 459 of the Penal Code of the State of California, in that the said defendants did willfully, unlawfully and feloniously, enter the inhabited dwelling house of M. W. Wolfe located at [REDACTED] with intent to commit theft.

COUNT II

AS A DIFFERENT STATEMENT OF THE SAME CAUSE OF ACTION SET FORTH IN COUNT I ABOVE, the said defendatns, did in the above Judicial

District, County of Kings, State of California on or about August 20, 1982, commit a(n) FELONY, namely: violation of Section 487(3), of the Penal Code of the State of California, in that the said defendants did willfully, unlawfully and feloniously steal, take and carry away a gun ther [*sic*] personal property of M. W. Wolfe.

Dated this 22nd day of September, 1982.

/*s*/ ROBERT R. MALINE
ROBERT R. MALINE
District Attorney

[SEAL OMITTED]

This document in which this certificate is affixed is a full, True and correct copy of the original on file and of record in my office

[ILLEGIBLE] *5-21-04*

By /*s*/ ILLEGIBLE Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

No. 6891

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

Date: Sept. 27, 1982

Judge: Hon. Larry G. McKee
Reporter: Victoria L. McNutt
Clerk: Mary Lou Chase
Bailiff: Mary Umbaugh
District Attorney:
by PETER SCHULTZ Deputy
PETER SCHULTZ
Counsel for Defendant: Arthur Markham
Deputy Probation Officer: /s/ STEVEN BROWN
STEVEN BROWN

( ) ARRAIGNMENT (x) CONTINUED ARRAIGNMENT
( ) PRE-TRIAL DISPOSITION
( ) TRIAL READINESS HEARING
(xx) BAIL REDUCTION MOTION
( )

PEOPLE REPRESENTED AS STATED ABOVE: DEFENDANT PRESENT WITH/~~WITHOUT~~ COUNSEL

( ) Defendant ( ) Counsel handed certified copy of ( ) Information ( ) Indictment ( ) _____

( ) Defendant stated true name as shown ( )_____

( ) Clerk read ( ) Information ( ) Indictment ( ) Order Certifying to Superior Court

( ) Court ( ) advised defendant of legal rights, including right to an attorney ( ) defendant wants attorney but has no money to hire one ( ) defendant waives right to an attorney ( ) waives being further advised of legal rights

( ) Court appoints_____

(✓) Attorney ( ) present in Court and accepts the appointment (✓) requests a continuance ( ) to study transcript ( ) to make a Motion (✓) *995 P.C.*

( ) Defendant, through counsel moves to set aside Information under Section 995 P.C.

( ) Declaration of defendant and counsel accepted and filed

(✓) Defendant ( ) withdraws plea of_____ ( ) plead guilty as charged in Count __( ) plead guilty of the lesser offense of _____(✓) plead not guilty as to Count ___ ( ) plead guilty by reason of insanity ( ) pleads nolo contendre ( ) waives time to plead

( ) Defendant advised of legal rights and waived same regarding change of plea

( ) Defendant: ( ) admits ( ) denies prior convictions of ( ) felony ( ) being armed

( ) District Attorney requested case be dismissed in the interest of justice

(✓) *Waived Illegible*

( )

COURT:

( ) ordered matter be continued to *Oct. 18, 1982* at 8:15 a.m. *995 P.C. RTC*

(✓) ordered bail at *$2,000* ( ) fixed the degree of the offense at _____ degree

( ) suspended criminal proceedings and certified matter to civil court, and ( ) appointed Drs. _____ to examine the defendant to determine if he/she is ____ and continued the matter to _____ at 8:15 a.m. _____

( ) certified the defendant back to Criminal Court

( ) suspended proceedings on ground defendant is a minor defendant certified to Juvenile Court

( ) defendant waived statutory time for_____

(✓) set case for trial on *Nov. 8, 1982* Jury ( ) demanded ( ) waived

( ) referred matter to probation officer for report and recommendation and continued matter to _____ for hearing on said report and for sentencing

( ) ordered defendant ( ) remain at liberty on the bail previously posted ( ) be released on own recognizance ( ) remain in custody ( ) be released from custody

( ) ordered case be dismissed as requested ( ) ordered bail be exonerated ( ) ordered trial dates be vacated

() pre-trial conference set for_____

(✓) pre-trial disposition set for *Oct. 18, 1982*

(✓) trial readiness hearing set for *Oct. 25, 1982*

( ) ordered trial dates be confirmed

(✓) *Pet. A due 10-5-82, D.A. response due 10-15-82*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

No. 6891

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF

v.

GINO RODRIQUEZ, DEFENDANT

[Filed: Oct. 25, 1982]

DECLARATIONS AND ORDER REGARDING PLEA OF GUILTY/~~NOLO CONTENDERE~~/OR CHANGE OF PLEA

DECLARATION BY DEFENDANT

(To be completed by defendant with the help of his lawyer, if any)

I say that: (Type or print the following information)

(✓) 1. My true name is *Gino Rodriquez*

(✓) 2. I am/~~am not~~ represented by a lawyer.

My lawyer's name is *Arthur T. Markham*

(✓) 3. I have received a copy of the Information/~~Indictment~~ against me. I understand all the crimes charged against me, and I ~~do~~/do not

wish to have the Information/ ~~Indictment~~ further explained to me.

(✓) 4. I understand the maximum and minimum punishments I could receive for each crime are:

Count	Crime	Maximum and Minimum Punishment
1	*459*	*Max 3 years State Prison &*
Probation cannot be		*up to 10,000 fine, or 5 yrs.*
unless unusual cir-		*Felony Probation with up to*
cumstances.		*1 year county jail*
2	*487(3)*	" " "

(✓) 5. I understand that as to each crime charged against me, I have the right to say:

(a) I am not guilty.
(b) I am not guilty because of insanity.
(c) I don't wish to defend against the charge.
(d) I am guilty.

(✓) 6. I understand that I have the following constitutional rights:

(a) The right to a speedy and public trial.
(b) The right to be tried by a jury.
(c) The right to see, hear and question all the witnesses against me, including the person who makes the accusation against me.
(d) The right at the trial to present evidence in my favor and either to testify for myself, or if I wish, I may remain silent, and I understand that no one can compel me to testify against myself.

(e) The right to have the judge compel the attendance of witnesses or production of evidence related to my crime.

(f) The right to have a qualified lawyer defend me before, during and after the trial.

(✓) 7. I understand that if I say I (am guilty of) (~~don't wish to defend against~~) a crime charged against me, I will give up all of the above constitutional rights as to that crime.

(✓) 8. I understand that if I say (am guilty of) (~~don't wish to defend against~~) a crime charged against me, the judge could give me the same punishment as if I told him I am not guilty and were convicted by a jury. I understand the Judge may decide not to give me probation.

(✓) 9. I understand that if I tell the judge I (am guilty of) (~~don't wish to defend against~~) a crime charged against me, the judge will not set my sentence until after he reads and consider my past criminal record, if any, and any report and recommendation of the Probation Department.

(✓) 10. No one has told me, or promised or suggested to me, that I will receive a lighter sentence, or probation, or any other favors, to get me to say I (am guilty) (~~don't wish to defend against the charge(s)~~), nor has anyone, threatened or promised to reward me, my family or anyone else, to get me to say I (am guilty of) (~~don't wish to defend against~~) the crime(s) charged against me, save and except as follows: *If I plead guilty to 459 2d degree residential the charges in*

Handford [ILLEGIBLE] CR 22308 will be dismissed and Count 2 in the information will also be dismissed. There is no promise as to what sentence I will receive.

(✓) 11. *Arthur T. Markham* has fully explained to me:

(✓) (a) The information/~~indictment~~ against me, including the nature of each crime charged.

(✓) (b) The maximum and minimum punishments that I could receive for each crime charged, including the fact(s) that:

(✓) The court will not decide my sentence until after it considers my past criminal record, if any, and the Probation Department's report and recommendations.

(✓) The court may impose the maximum penalty permitted by law regardless of my guilty plea.

( ) M.D.S.O. proceedings must be instituted.

(✓) I may be committed to the Youth Authority.

( ) I may be committed to the Department of Corrections, Narcotics Rehabilitation Program.

( ) I am ineligible for probation.

( ) I can receive only a state prison sentence.

(✓) (c) My constitutional rights as set forth in this Declaration and the consequences of a guilty plea.

(✓) (d) This Declaration and its entire contents.

( ) (e) The legal effect of a plea of nolo contendere shall be the same as that of a plea of guilty, but the plea may not be used against me as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

(✓) 12. I understand that I have previously pleaded not guilty/~~not guilty by reason of insanity~~ to the crime(s) charged against me. I hereby declare that I desire to withdraw my plea(s) of not guilty/~~not guilty by reason of insanity~~ and enter a plea(s) of guilty/~~nolo contendere~~ (~~don't wish to defend against the charge(s)~~) (to Count *1*).

( ) 13. I freely and voluntarily say I (am guilty of) (don't wish to defend against) the following crimes charged against me:

Count	Crime
1	*459 2nd Degree Residential*

(✓) 14. *Arthur Markham* explained this form and its entire contents to me. I fully understand what I have stated in this Declaration and the consequences thereof, and I waive any right that I

may have to being further instructed thereon by the Court.

I declare under penalty of perjury that the above is true and correct.

Signed on *Oct 25*, 1982, at *Hanford*, California.
(Date) (Place)

/s/ GINO RODRIQUEZ
GINO RODRIQUEZ
(Signature of Defendant)

GINO RODRIQUEZ
(Type or Print Name of Defendant)

DECLARATION BY DEFENDANT'S ATTORNEY

(1) On *Oct 25*, 1982, at *Hanford*, California,
(Date) (Place)

I fully explained to the defendant:

(✓) (a) The Information/~~Indictment~~ against him, including the nature of each crime charged.

(✓) (b) The maximum and minimum punishments that the defendant could receive for each crime charged, including the fact(s) that:

(✓) The court will not decide the defendant's sentence until after it considers his past criminal record, if any, and the Probation

Department's report and recommendation.

(✓) The court may impose the maximum penalty permitted by law regardless of the defendant's guilty plea.

( ) M.D.S.O. proceedings must be instituted.

(✓) Defendant may be committed to the Youth Authority.

( ) Defendant may be committed to the Department of Corrections, Narcotics Rehabilitation Program.

( ) Defendant is ineligible for probation.

( ) Defendant can receive only a state prison sentence.

(✓) (c) The defendant's constitutional rights as set forth in his Declaration and the consequences of a guilty plea.

(✓) (d) The above Declaration by defendant and its contents.

(✓) (e) The meaning and legal effect of a plea of nolo contendere.

( ) 2. To the best of my knowledge and belief, defendant understands the matters set forth in his Declaration and each of his statements therein is accurate and true and is voluntarily and understandingly made.

( ) 3. The defendant's plea(s) of (guilty) (~~nolo contendere~~) is/~~are~~ accordance with the facts as related to me by the defendant.

( ) 4. I recommend to the court that:

(✓) The court accept the defendant's waiver of his constitutional rights as stated herein above.

(✓) The court accept the defendant's request to withdraw his prior plea(s) of not guilty/~~not guilty be reason of insanity~~ to Count (*1*).

(✓) The court accept the defendant's plea(s) of (guilty) (~~nolo contendere~~), (to Count *1* ").

I declare under penalty of perjury that the foregoing is true and correct.

Signed in the presence of the defendant on *Oct 25*, 19*82*, at *Hanford*, California.
(Date) (Place)

/s/ ARTHUR T. MARKHAM
ARTHUR T. MARKHAM
(Attorney for Defendant)

ARTHUR T. MARKHAM
(Type or Print Name of Attorney)

208 N. Douty Rm 212 Handford
(Type or Print Address)

ORDER OF ACCEPTING PLEA

Having ascertained in open court that: (1) The defendant fully understands his constitutional rights, the nature of the crime(s) charged in the Information/ ~~Indictment~~ and the consequences of his (guilty) (~~nolo~~

~~contendere~~) plea(s) and (2) The defendant understandingly and voluntarily withdraws his former plea(s) of not guilty/~~not guilty by reasons of insanity~~, and pleads (guilty) (~~nolo contendere~~) and waives his constitutional rights.

IT IS ORDERED that the defendant's request to withdraw his former plea(s) of not guilty/~~not guilty by reason of insanity~~ be granted and that defendant's plea(s) of (guilty) (~~nolo contendere~~) and waiver be accepted and entered in the minutes of this court.

Dated: _____

/s/ LARRY G. MCKEE
LARRY G. MCKEE
Judge of the Superior Court

[SEAL OMITTED] This document to which this certificate is affixed is a full, true and correct copy of the original on file and of record in my office.

Date: *5-21-04*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

No. 6891

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

Date: Oct. 26, 1982

Judge Hon.: Larry G. McKee
Reporter: Julie Westbay
Clerk: Mary Lou Chase
Bailiff: Mary Umbaugh
District Attorney: by Michael Woodbury Deputy
Counsel for Defendant: Arthur Markham
Deputy Probation Officer: *Glenda Fuji*

( ) ARRAIGNMENT ( ) CONTINUED ARRAIGNMENT
( ) PRE-TRIAL DISPOSITION
(x) TRIAL READINESS HEARING
( ) FELONY (In ___ Counts) to wit:
( ) MOTION TO FILE AMENDED INFORMATION and
( ) MISDEMEANOR

PEOPLE REPRESENTED AS STATED ABOVE: DEFENDANT PRESENT WITH/~~WITHOUT~~ COUNSEL

( ) Defendant ( ) Counsel handed certified copy of ( ) Information ( ) Indictment ( ) _____

( ) Defendant stated true name as shown ( )_____

( ) Clerk read ( ) Information ( ) Indictment ( ) Order Certifying to Superior Court

( ) Court ( ) advised defendant of legal rights, including right to an attorney ( ) defendant wants attorney but has no money to hire one ( ) defendant waives right to an attorney ( ) waives being further advised of legal rights ( ) Court appoints_____

( ) Court appoints _____

( ) Attorney ( ) present in Court and accepts the appointment ( ) requests a continuance ( ) to study transcript ( ) to make a Motion ( ) ___

( ) Defendant, through counsel moves to set aside Information under Section 995 P.C.

(✓) Declaration of defendant and counsel accepted and filed

(✓) Defendant (✓) withdraws plea of *not guilty* (✓) plead guilty as charged in Count *1-459 P.C.* ( ) plead guilty of the lesser offense of ____( ) plead not guilty as to Count ___ ( ) plead not guilty by reason of insanity ( ) pleads nolo contendre ( ) waives time to plead

(✓) Defendant advised of legal rights and waived same regarding change of plea

( ) Defendant ( ) admits ( ) denies prior convictions of ( ) felony ( ) being armed

( ) District Attorney requested case be dismissed in the interest of justice
(✓) *D.A. to dismiss HSC & other charges*
( )

COURT:
(✓) ordered matter to be continued to *Nov. 23, 1982* at 8:15 a.m. *P/S*
( ) fixed bail at $____ ( ) fixed the degree of the offense at _____degree
( ) suspended criminal proceedings and certified matter to civil court, and ( ) appointed Drs._____to examine the defendant to determine if he/she is ____ and continued the matter to _____ at 8:15 a.m. _____
( ) certified the defendant back to Criminal Court
( ) suspended proceedings on ground defendant is a minor, defendant certified to Juvenile Court
( ) defendant waived statutory time for_____
( ) set case for trial on __ Jury ( ) demanded ( ) waived
( ) referred matter for probation office for report and recommendation and continued matter to _____ for hearing on said report and for sentencing
( ) ordered defendant ( ) remain at liberty on the bail previously posted ( ) be released on own recognizance ( ) remain in custody ( ) be released from custody
( ) ordered case be dismissed as requested ( ) ordered bail be exonerated ( ) ordered trial dates be vacated
() pre-trial conference set for_____
( ) pre-trial disposition set for _____
( ) trial readiness hearing set for _____

( ) ordered trial dates be confirmed
(✓) *bail revoked, set bail at $10,000.00*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF KINGS

No. 6891

THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

Date: Nov. 23, 1982

Judge: Hon. Larry G. McKee
Reporter: *William Quilty*
Clerk: Mary Lou Chase
Bailiff: Mary Umbaugh
District Attorney: by *Michael Woodbury* Deputy
Counsel for Defendant: Arthur Markham
Deputy Probation Officer: *Tana Sales*

(xx) HEARING ON REPORT OF PROBATION OFFICER AND PRONOUNCEMENT OF SENTENCE
( ) REVOCATION OF PROBATION
( ) VIOLATION OF PROBATION
( ) CHANGE OF PLEA UNDER SECTION 1203.4 P.C.

PEOPLE REPRESENTED AS STATED ABOVE: DEFENDANT PRESENT WITH/~~WITHOU~~T COUNSEL

(✓) Report of Probation Officer on file
(✓) Court has read and studied the report and makes it a part of the record
(✓) Attorney spoke on behalf of the defendant
(✓) District Attorney ( ) concurs ( ) objects to the recommendation of the Probation Officer (✓) recommends *aggravated term*
( ) Defendant advised of constitutional rights and waived same
(✓) Defendant stated no legal cause why judgment should not be pronounced
( ) Defendant ( ) arraigned for sentencing ( ) waived arraignment for sentence
( ) District Attorney ( ) Probation Officer stated defendant has violated terms of probation ( ) defendant admitted violation of probation
( ) Probation Officer reports defendant has successfully completed probation

COURT ORDERED:
( ) proceedings be suspended without imposition of sentence ( ) imposition/execution of sentence be suspended
(✓) probation to be ( ) granted (✓) denied ( ) revoked ( ) modified ( ) reinstated for _____
( ) defendant ( ) serve _____ in County Jail with credit for time served in the amount of _____ days ( ) pay fine in the amount of $ _____
( ) defendant be sentenced to State Prison for term prescribed by law *24 mos*
(✓) defendant be sentenced to State Prison for ( ) lower (✓) middle ( ) upper term of years/months for violation of *459 P.C.* plus _____ years/months for violation of _____

( ) sentence to run ( ) concurrent with _____
( ) consecutive with _____
( ) defendant to certified to CYA for possible acceptance. Sheriff to deliver said defendant to such reception reception facility as the CYA may designate, if so accepted
( ) defendant accepted terms of probation
( ) defendant ( ) remanded to ( ) released from custody of Sheriff
( ) Sheriff directed to deliver defendant into custody to the Director of Corrections at Chino
( ) defendant advised of right to appeal said judgment
( ) defendant's plea of guilty be withdrawn and plea of not guilty be entered under Section 1203.4 P.C.
(✓) *Count 2 dismissed per motion of D.A.*
(✓) *D.A. to dismiss HJC charges*
( )
( )

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CR-03-142-RHW
Vio: 18 U.S.C. § 922(g)(1) Felon in Possession of a Firearm

UNITED STATES OF AMERICA, PLAINTIFF

v.

GINO G. RODRIQUEZ, DEFENDANT

[Filed: July 15, 2003]

INDICTMENT

The Grand Jury Charges:

On or about April 1, 2003, in the Eastern District of Washington, GINO G. RODRIQUEZ, having been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce a firearm, to wit: a *KAHR PUC* Model K40, .40 caliber handgun, serial number DA 0733, which firearm had theretofore been transported in interstate commerce; all in violation of 18 U.S.C. §§ 922(g) and 924(e).

DATED this *15th* day of July, 2003.

A TRUE BILL

/s/ [ILLEGIBLE]
Foreperson

/s/ [ILLEGIBLE]
JAMES A. MCDEVITT
United States Attorney

[ILLEGIBLE]
/s/ JOSEPH H. HARRINGTON
Assistant United States
Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 03-CR-142-RHW
Spokane Washington Appeal Transcript

UNITED STATES OF AMERICA, PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

May 27, 2004
Proceedings

Volume 6

BEFORE THE HONORABLE ROBERT H. WHALEY UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: JOSEPH H. HARRINGTON
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210

ALSO PRESENT: DET. MICHAEL D. RICKETTS
Spokane County Sheriff's Office

FOR THE DEFENDANT: KIMBERLY A. DEATER
Federal Defenders of Eastern
Washington and Idaho
10 North Post, Suite 700
Spokane, WA 99201

Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

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DEFENSE'S MOTION TO SUPPRESS FIREARM

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[464]

(May 27, 2004; 11:30 p.m.)

THE COURTROOM DEPUTY: We have *United States of America v. Gino Rodriguez* [*sic*], Case No. CR-03-142. Time set for sentencing hearing.

MR. HARRINGTON: Good morning, Your Honor. May it please the Court: By way of background, Mr. Rodriguez [*sic*] was convicted by a jury of being a felon in possession of a firearm. There has been a pre-sentencing investigation report that is dated May 21st, 2004, which report has been compiled by Ms. Gloria Petretee of the U.S. Probation Office.

There appears to be two large issues before the Court. The first large issue is the applicability of the armed career criminal statute, and the second large issue is whether any of the defendant's prior convictions are deemed related cases.

Your Honor, first, with respect to the applicability of the armed career criminal statute, as the Court knows, it's necessary that there be three prior predicate felony offenses that are either crimes of violence, such as burglary, or drug trafficking crimes, which carry a penalty of ten years or greater. The question is whether the defendant's 1995 drug-related convictions in the Spokane County Superior Court are predicate convictions that fall within the definition of the armed career criminal statute.

The parties have briefed that issue. I would note, however, Your Honor—and I—understanding the significance [465] and importance of resolving this issue correctly, the defendant did file a motion a couple of days ago, May 25th of 2004, in response to the govern-

ment's position, but also raising some new issues. One is whether the due process notice requirement is effective in this case; second, whether the rule of lenity applies; and, third, it appears that this is the first time there's been a direct objection to including or counting the 1982 California burglary conviction.

In addition, Your Honor, the government has filed a motion to continue this sentencing. I would note, Your Honor, the government has certified copies of the defendant's convictions. But in light of the objection raised with respect to the 1982 burglary conviction out of California, the government is requesting additional time to obtain the commitment orders from California Department of Justice, which will have the defendant's fingerprints; and the government will—intends to then compare or have a forensic fingerprint expert compare those fingerprints with his known fingerprints here—that were taken here in connection with the instant matter. And that will, I would proffer to the Court, conclusively prove that the defendant is the one that was convicted or burglary in California.

I would also note, Your Honor, a request—I think it's important for the Court to know that the government did request those fingerprints the first part of May, and they have not [466] been received because, first, of the age of the convictions, and also the Department of Justice is working as best they can. This morning I talked to Dennis Cross (phonetic) in Sacramento, who works for the Department of Justice in California. He said that he would make this a priority on this schedule and asked me to follow up with the faxed memorandum, which I will do today.

With respect to the second, larger issue with respect to the related cases, the government's provided briefing with respect to the government's position.

THE COURT: Related cases doesn't become an issue if he's an armed career criminal.

MR. HARRINGTON: That's correct, Your Honor. I think the arguments have been in the alternative. If the armed career criminal statute doesn't apply, then the question about the defendant's—not only his criminal history but also his base offense level with respect to prior felony convictions would come into play.

THE COURT: And unless you can get two armed career criminal convictions out of the sentences that were done on the same day in Spokane County, then he would not be an armed career criminal. If they give you the one out of California, you still need to get two out of this three-case sentencing.

MR. HARRINGTON: There's a question about whether the defendant has a second residential burglary conviction in California. I have a copy of a judgment and commitment order [467] dated December—or—dated 1980 which would seem to indicate the defendant has a second residential burglary conviction in California. And assuming that's accurate, he would have two prior violent crime convictions out of California. And then the government would need to prove at least one of the convictions here in Spokane County was a ten-year—held a ten-year or larger or greater penalty.

THE COURT: But the conviction you have is not part of the pre-sentence report?

MR. HARRINGTON: That's correct, Your Honor. And—

THE COURT: But is it certified?

MR. HARRINGTON: It is certified. The question then becomes: Is that—is that Mr. Rodriguez [*sic*]? And that's why I've asked for a continuance.

THE COURT: All right. Well, let me hear from Ms. Deater.

MR. HARRINGTON: Thank you, Your Honor.

THE COURT: With respect to the authenticity of the criminal history, what are you objecting to?

MS. DEATER: Well, as far as the authenticity, if they are going to use any one of those to enhance the sentence, I believe under *Taylor v. The United States*, they're going to have to prove the conviction and the facts of the conviction—that the facts of the conviction support that the conviction qualifies as an act or predicate offense as either a serious or [468] violent offense.

THE COURT: Let me ask it a different way. Maybe you answered me, but I'm just trying to understand you.

MS. DEATER: All right.

THE COURT: The impression I got from what Mr. Harrington was saying was that the burglary conviction that is included in the pre-sentence report—that you're contending that it wasn't your client?

MS. DEATER: I'm contending that—I'm not contending that it wasn't my client. I'm contending that they have the burden of proof to show by clear and convincing evidence.

THE COURT: All right. Then it seems to me that takes care of what Mr. Harrington is saying his

need for a continuance is because the fingerprints won't tell us that.

MS. DEATER: And besides that—

THE COURT: Well, let me address that.

MS. DEATER: Okay.

THE COURT: It seems to me, Mr. Harrington, she's agreeing that's her client. It's just a matter of the legal significance of whatever proof you have.

MS. DEATER: From the 1982? We're not admitting and we're not denying that conviction, Your Honor. We would leave it to the government to prove it.

THE COURT: Well, if you're not—

[469]

MS. DEATER: I understand what the Court is saying. It would alleviate the necessity of having somebody come to testify regarding the fingerprints if we admit that, yes, that was Mr. Rodriguez [*sic*] that was named in that charge.

THE COURT: But you're not admitting that.

MS. DEATER: No.

THE COURT: All right. Then I'm going to continue this.

MS. DEATER: Your Honor, if I may?

THE COURT: Yes.

MS. DEATER: I don't know that that even becomes an issue unless the Court finds that the three 1995 Spokane County convictions—that any one of them qualify for ACCA purposes. Also, the 19—

THE COURT: You're right. But I am muddled enough on that issue that if I had more time to think about it, I'd do a better job. I send out an order yesterday to you people about this, and that's why I was late coming out. I was still trying to deal with this issue with my law clerk. And I want to continue it because I want to be better educated, in my mind, about the law with respect to these three offenses. It seems to me one approach you can take is that it's a categorical approach. Each of those offenses for the offense carries five years. And so if that's true, if you take that approach, none of them are predicate offenses.

[470]

A second is that no—the charging documents all carry ten years. And so—I mean, the judgments. And so that would tell you that the ten years were applicable and all three of them would apply. Or you could take the position that they were done seriatim. One of them originally was—the first one was a five year; but once you had that conviction, the next two would be ten years. Or you can conclude that there's no way to tell that from the record, and so they may have been all at one time. I just—I'm confused enough about it that I just need to think more conceptually about what it means.

MS. DEATER: Well, then we could just apply the rule of lenity, Your Honor, and—

THE COURT: Well, we may. We may. I don't know. But I don't want to just take a muddled record and say, well, I'm going to look at it this way and have the Circuit sort it out. I want to do a—I mean, I could rule today and I wouldn't—but I would feel like I hadn't given Mr. Rodriguez [*sic*] or the government as much—some of your late filings prompt me to be troubled about

what I'm doing. And I think it's fairer to you, frankly, and fairer to the government for me to continue it. I'm not so concerned about the government not—I mean, if the only issue was the government hadn't gotten their stuff here in time, it's a big government and I don't mind holding them to do that. But there are issues in addition to that that I want more time on.

[471]

MS. DEATER: Yes, Your Honor.

THE COURT: From your perspective, Mr. Harrington, for the reasons that you want more time, how much time do you need?

MR. HARRINGTON: Your Honor, I would respectfully submit a minium of two weeks.

THE COURT: All right. Do we have something out there, Ms. Fox?

THE COURTROOM DEPUTY: The first time we could do would be July 1st at 1:00.

THE COURT: That's the best I can do.

MR. HARRINGTON: All right. Thank you.

THE COURT: Is that all right with you, Ms. Deater?

MS. DEATER: Yes, Your Honor. Thank you.

THE COURT: If that date doesn't fit with your calendar, let us know. But that's the first I can do it. June is kind of bad for me. All right. I'm going to continue it till then.

I'm going to forget what I've said here, but I don't want you people to forget it because I want you to bring it back to me. But it seems to me that we have the is-

sues of whether the California burglary is going to meet—first, if you can prove that it's Mr. Rodriguez [*sic*], whether or not it would qualify as a crime of violence; and then if you have a record of some other offense, whether that would qualify as a crime of violence. [472] And so I would like some further filing from you that addresses those things; and then secondly, whether, out of the three convictions in Spokane County, any of them would apply. And I may be missing your arguments when I summarize it, so I want you to educate me if I am. But the way I look at it is Washington has a statute which carries a five-year penalty for these type drug offenses, but it has an enhancing statute that permits you to double it. And so there are two questions. One, would you look at the enhancing statute to determine the ten years, or would you just look at the underlying offense? Is it offense driven as opposed to the sentencing enhancement? And I sort of try to make analogies in my mind. Let's assume that Washington had a statute that said a serious drug offense carries five years; but if you do it with a minor, then an enhancement to the sentence is another ten years. But the offense is the same. It's a sentencing issue. Or if they said if you had a firearm in connection with it, we add another ten years. Would you use the five years, or would you use the sentence? And I don't know that because in looking at Washington, there's a case—I think it's *Kelley*—that says that it's an enhancement, not a—so under that scenario, they're all five-year offenses. And the question then becomes: Do you go beyond that to the enhancement? And then separate from that is the issue of is the record sufficient to establish that at the plea that factually, they were done one after the [473] other, so that you could say the first one was five years,

the seconds one was ten, the third was ten, or that you can't tell or that that's not relevant? I mean, if they're all done as part of one sentencing, where they were five-year offenses, that—I mean, I don't know if you're just supposed to sort of intellectually say these offenses occurred on three different dates, the pleas were taken at the same time, but there had to have been one plea that preceded the other pleas, and so when that plea was over, you were suddenly enhanced to ten years, or whether—I don't know. So I'm fuzzy enough about it that I'm admitting it to you and asking you to help me at the next sentencing.

Does anybody have any questions? I'd rather answer them now because I'm going to take this thing off my plate.

MS. DEATER: Your Honor—

THE COURT: Have I raised anything that you want some guidance on?

MS. DEATER: You know, I don't know how—I have an idea. I've already researched the issues that you're discussing in light of the fax I received from the Court and that the government received as well yesterday afternoon. And what I looked at—and I don't know. I'm just rediscussing the issue with you. What I looked at, my understanding was that the term that required the analysis or the focus was the term conviction in 924(e) as well as the doubling statute in [474] Washington state.

THE COURT: All right. Well, give it your best shot, and I'll see you on the 1st of July.

Court's in recess.

(The proceedings recessed at 12:00 noon.)

[475]

CERTIFICATE

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on page i here to; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this *23rd* day of *November*, 2004.

/s/ DEBRA KINNEY CLARK
DEBRA KINNEY CLARK
Official Court Reporter
United States District Court
Eastern District of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 03-CR-142-RHW
Spokane Washington Appeal Transcript

UNITED STATES OF AMERICA, PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

Sept. 2, 2004
Proceedings

Volume 7

BEFORE THE HONORABLE ROBERT H. WHALEY UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: JOSEPH H. HARRINGTON
Assistant United States Attorney
P. O. Box 1494
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ALSO PRESENT: DET. MICHAEL D. RICKETTS
Spokane County Sheriff's Office

FOR THE DEFENDANT: KIMBERLY A. DEATER
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Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

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(September 2, 2004; 11:30 a.m.)

THE COURTROOM DEPUTY: We have *United States of America v. Gino Rodriguez* [*sic*], Case No. CR-03-142. Time set for sentencing hearing.

THE COURT: Let me put in the record—do you have something you need to put in the record, Mr. Harrington, before I start? You're here and Mr. Rodriguez [*sic*] is here and Ms. Deater is here. Is that all you need?

MR. HARRINGTON: I am prepared to put on some testimony, but nothing to introduce the case.

THE COURT: Testimony?

MR. HARRINGTON: Yes. To authenticate the judgment and commitment orders, I was going to put on some testimony from Special Agent Michael Ricketts, who took the original fingerprint card. And then the ident officer, Mr. Coppock.

THE COURT: Okay. You go ahead, then.

MR. HARRINGTON: Shall I?

THE COURT: You go ahead now. Yeah.

MR. HARRINGTON: Okay. Your Honor, the government would call Detective Michael Ricketts.

(WITNESS, MICHAEL RICKETTS, called as a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:)

THE COURTROOM DEPUTY: If you'll have a seat. And if you'll state your name; and spell you first and your last [477] name, please, for the record.

THE WITNESS: Michael Ricketts, R - i - c - k - e - t - t - s.

DIRECT EXAMINATION

BY MR. HARRINGTON:

Q. And, for the record, how are you employed?

A. With the Spokane County Sheriff's Office. I'm a detective, and I'm currently assigned to a task force with the Bureau of Alcohol, Tobacco & Firearms.

Q. And were you involved in the investigation involving the defendant, Mr. Rodriguez [*sic*]?

A. Yes, I was.

Q. In connection with your involvement, did you have an opportunity to be present when his fingerprints were taken?

A. Yes.

Q. I'm going to hand you what's been previously marked as government Exhibit No. 1 and ask if you can identify this.

(Materials were handed to the witness.)

A. This is the fingerprint card that was—when Mr. Rodriguez [*sic*] was processed at U.S. Marshal's Service. I was present when he was processed, and then the fingerprints were applied to the card.

Q. And do you know approximately when that date was?

A. It was July 8th, 2003.

Q. And is your name listed on that card?

A. Yes, it is.

[478]

Q. And is that the original card containing Mr. Rodriguez's [*sic*] fingerprints?

A. One of the originals. I make two originals. And I send one to the FBI, and then I keep one for the case file for comparison purposes.

Q. And when we refer to Mr. Rodriguez [*sic*], are we referring to the defendant?

A. Yes, we are.

MR. HARRINGTON: The government would move for the admission of Exhibit 1, which is the original fingerprint card.

MS. DEATER: I have no objection.

THE COURT: Exhibit 1 is admitted without objection.

MR. HARRINGTON: I have no further questions of this witness, Your Honor.

THE COURT: All right. You may step down. Any more evidence?

MR. HARRINGTON: Yes, Your Honor. The government would move for the admission of what has been previously marked as government's Exhibits No. 2, 3, 4, 5, 6, 7, and 8, all of which are the certified copies of judgment and commitment orders, certified and authenticated, as well as Exhibit No. 3 is a fingerprint

card containing the defendant's fingerprints from his convictions in California.

THE COURT: Any objection?

MS. DEATER: No, Your Honor.

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THE COURT: They're admitted without objection.

MR. HARRINGTON: Your Honor, the United States would call Mr. Craig Coppock.

THE COURT: Let me ask you this. Is this—I didn't get the impression that any of the convictions that were in the pre-sentence report were being contested.

MR. HARRINGTON: My understanding, Your Honor, is that the defense wanted to have proof of this on the record.

MS. DEATER: Your Honor, we addressed this last time; and the Court asked us if we were admitting to the convictions. There isn't a question as to the Spokane County convictions. As far as the two convictions from California, the burglary convictions, we said we weren't stipulating to anything. We weren't denying anything either. So I believe—

THE COURT: All right. Go ahead.

MR. HARRINGTON: All right. Thank you, Your Honor.

THE COURT: I'm just trying to figure out what we're arguing about.

MR. HARRINGTON: I understand.

THE COURTROOM DEPUTY: Sir, would you raise you right hand, please?

(WITNESS, CRAIG COPPOCK, called as a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:)

THE COURTROOM DEPUTY: Okay. If you'll have a seat. And if you'll state your name; and spell your first and your [480] last name, please, for the record.

THE WITNESS: Craig Coppock, C - r - a - i - g C - o - p - p - o - c - k.

DIRECT EXAMINATION

BY MR. HARRINGTON:

Q. Would you, for the record, tell the Court how you're employed?

A. I'm a forensic specialist with the Spokane County/City Forensic Unit.

Q. And briefly, what are your duties and responsibilities?

A. My duties could be broken down into three major components: crime scene investigation, fingerprint identification, photographic documentation.

Q. And how long have you been doing those responsibilities?

A. Since 1988, and since 1992 with Spokane.

Q. And have you ever been admitted—or—provided expert testimony with respect to fingerprints?

A. Yes.

Q. How many times? Can you estimate?

A. I cannot estimate. Numerous times.

Q. All right. I want to hand you what have been previously marked as Exhibits No.—first, Exhibit No. 1, 2, 3, 4, 5, 6, 7, and 8. And Exhibit No. 1 I think is attached to Exhibit No. 2. It's a fingerprint card.

(Materials were handed to the witness.)

A. Yes.

[481]

Q. (By Mr. Harrington) Do you recognize those items?

A. I do.

Q. And just generally, what are they?

A. Well, Item No. 1 is a fingerprint card that I used in comparison against other documents.

Q. All right. And how about Exhibits No. 2 through 8?

A. Fingerprint No. 2 is my report.

Q. That's Exhibit No. 2?

A. Yes.

Q. Okay.

A. And actually, there's two reports here, one dated June 2nd, the other with a final date of 1- 23 of '04. And 3 through 8 are just various court documents.

Q. And Exhibit No. 3, does that contain fingerprints from California convictions?

A. Yes. It appears so. From Sacramento.

Q. Okay. And then Exhibit No. 4?

A. Exhibit No. 4 is also some court documents.

Q. And for interests of time, is that a California case, number 6271?

A. State of California. That's correct. 6271.

Q. And Exhibit No. 5? Those—

A. Again, another California document.

Q. Do you have that document in front of you?

A. No. 5?

[482]

Q. Yes.

A. No. 5? Yes.

Q. And is that under California case 6591?

A. Yes, it is.

Q. And Exhibit No. 6—do you have that document in front of you?

A. Yes.

Q. And what's that?

A. This is a judgment and sentence document from Spokane.

Q. And is that in Case No. 95-1-01071-8?

A. I don't see that. There's numerous numbers on here.

Q. Let me just direct your attention to the caption of the document—of the documents. And on the right-hand portion of the document, is there something that says No., or N - o?

A. Yes. This is 95-1-01070-0.

Q. Okay. And does that document or exhibit contain fingerprints at page 9 of 9?

A. Yes, it does.

Q. And—

A. And I see my initials there as well.

Q. Okay. And with respect to the next exhibit?

A. No. 7?

Q. Yes.

A. County of Spokane document, judgment and sentence, No. 95-1-01071-8.

[483]

Q. And does that document also contain fingerprints at page 9 of 9?

A. Page 9 of 9? Yes. It also has fingerprints, with my initials.

Q. And with respect to Exhibit No. 8, is that also documents from Spokane Superior Court?

A. Yes.

Q. Case No. 95-1-01089-1?

A. Correct.

Q. And does that—do those documents also contain fingerprints as well?

A. Yes. Page 9 of 9. And again, my initials are present.

Q. Now, I want to ask: In connection with this case, were you asked to do some comparison of fingerprints between these court documents that we referred to and Mr. Rodriguez's [*sic*] original fingerprint card, Exhibit No. 1?

A. I was. There was one document in here I didn't note the fingerprint right away. If I could thumb back through them real quick.

(Pause in proceedings.)

A. That would be Exhibit No. 5. I don't see the fingerprint card present in here.

Q. (By Mr. Harrington) Okay. And that would be in case number—California case number—

A. 6891.

[484]

Q. Okay. All right. Other than—with that acknowledgment, did you do some comparison of fingerprints in this case?

A. I did.

Q. And what is it that you compared?

A. I compared four separate judgment and sentences from Spokane County and six fingerprint cards of various dates against a local ten-print card generated from the Federal Building here.

Q. And were those—the fingerprints you compared the original ten-print card to, were those fingerprints from the California cases as well as the Spokane County cases?

A. Correct.

Q. And after comparing those fingerprints, did you reach any conclusion?

A. I did.

Q. And what was your conclusion?

A. Of the six ten-print cards or copies of ten-print cards from the documents and the four judgment and sentence documents against the common card of Gino Rodriguez [*sic*], in my expert opinion, I—my conclusion was that they all originated from one and the same person.

Q. Okay. And that would include the two California cases as well as the Spokane County cases; is that correct?

A. I believe so.

MR. HARRINGTON: I have no further questions, Your [485] Honor.

THE COURT: Can you tell me which California cases they are? You might look at the pre-sentence report by paragraph. It would make more sense.

MR. HARRINGTON: I'm sorry, Your Honor?

THE COURT: You might look at the pre-sentence report that lists the California convictions and just see which ones they are by paragraph that he's identified. I don't know which one Exhibit 5 is. It's not there.

MR. HARRINGTON: I'm referring to paragraph 42 of the pre-sentence investigation report.

Q. (By Mr. Harrington) Sir, is there fingerprints that you compared in connection with case number 6891 out of Hanford, California?

A. Yes.

Q. And with respect to paragraph #38, was there a case from California—

MR. HARRINGTON: One moment, Your Honor.

Q. (By. Mr. Harrington)—entitled or captioned 6271?

A. I do not see a fingerprint card for 6271.

MR. HARRINGTON: Hold on one minute.

Q. (By Mr. Harrington) I'd like to refer your attention to Exhibit No. 3, the third page.

A. Okay. On Exhibit—

Q. This would be Exhibit No.—

[486]

A. —No. 3

Q. —No. 3. And if you go back to the—

A. Yes. It would be the—the card dated or received 8-21 of '82. That would be on the fingerprint card. And I do have that. Yes. I do have that.

Q. For case number 6271? And I want to refer your attention—maybe what I'll do is—

THE COURT: These are in evidence. So maybe you can just look at them and tell us what dates they are and which convictions they are.

MR. HARRINGTON: All right. I'm looking at the California conviction dated—

THE COURT: Exhibit what?

MR. HARRINGTON: This would be Exhibit —part of Exhibit No. 3.

THE WITNESS: Okay.

THE COURT: You don't need to answer. They're in evidence. So unless—you could just tell us which ones apply to which—

MR. HARRINGTON: Okay.

THE COURT: —and the defense can tell us if they object.

MR. HARRINGTON: Okay. Exhibit No. 3 contains fingerprints from the two California convictions. And as part of that, there is a page—and it's the fourth page of that [487] exhibit, and there's a number—

THE COURT: There's a number of California convictions. So I'm just trying to look at the pre-sentence report and see which ones you are now identifying.

MR. HARRINGTON: I'm referring to a date of April 15th of 1980 in file number 6271, and there's fingerprints attached to that conviction.

THE COURT: It's your position that that's paragraph 38?

MR. HARRINGTON: There's a reference to a grand theft auto. But I don't believe that the pre-sentence report had that—the other burglary conviction listed, and it was identified subsequently to the probation office.

THE COURT: All right. Are you saying it's not in the pre-sentence report?

MR. HARRINGTON: It appears that way, Your Honor.

THE WITNESS: No. There are two cards in that Exhibit 3.

MR. HARRINGTON: Okay. There's two fingerprint cards, one for the 1980 conviction in case number 6271 and a second set of cards for a 1982 burglary conviction in case number 6891.

THE COURT: And 6271 is the one that's in paragraph 38?

MR. HARRINGTON: Well, paragraph 38 refers to a grand [488] theft; and I believe there were two charges in that case. One was grand theft, and the other was burglary. And the exhibits—the government has provided the certified copy of the judgment and commitment order in that case.

THE COURT: All right. Let me see Exhibit 3.

(Materials were handed to the Court.)

MR. HARRINGTON: And, Your Honor, you may want to refer as well to Exhibit No. 4.

(Materials were handed to the Court.)

THE COURT: Is there a contention that this burglary that's now in the pre-sentence report changes any of the analysis of the base offense level or armed career criminal?

MR. HARRINGTON: It doesn't, Your Honor, because I believe for the guideline purposes, it washes out under the age of the conviction.

THE COURT: All right. Okay.

MR. HARRINGTON: But this document has been provided to Counsel and has been part of the briefing in this case.

THE COURT: All right. Okay.

MR. HARRINGTON: I don't have any further questions.

THE COURT: All right. Well, I still don't know what the other convictions are from the pre-sentence report that he has identified. If you can just tell me. We now have—he's identified the one in paragraph 42.

MR. HARRINGTON: The fingerprints associated—

[489]

THE COURT: Another California one. Which one? There's a number of California convictions in here.

MR. HARRINGTON: This would be Exhibit No. 4, which is the burglary conviction in 1980. And I don't believe that's included in the pre-sentence investigation report.

THE COURT: All right. Are those the only two California ones he's identified?

MR. HARRINGTON: Correct.

THE COURT: So you're not relying—and then we move to Spokane?

MR. HARRINGTON: Yes. Those two—the two burglary convictions out of California are Exhibits No. 4 and 5.

THE COURT: All right.

MR. HARRINGTON: Then we move to Spokane.

THE COURT: And which ones are there? Paragraph what?

MR. HARRINGTON: Exhibit No. 6 is in reference to Case No. 95—Spokane County Case No. 95-1-01070, and that's at paragraph 75 of the PSR.

THE COURT: Isn't that paragraph 64?

MR. HARRINGTON: With respect to paragraph 64, that's government Exhibit No. 7; and that's in connection with Spokane County Superior Court Case No. 95-1-01071-8. And Exhibit No. 8 refers to Spokane County Superior Court Case No. 95-1-01089-1 at paragraph 84 of the pre-sentence investigation report.

[490]

THE COURT: Okay. Thank you.

MR. HARRINGTON: Thank you, Your Honor.

THE COURT: Any questions, Ms. Deater?

MS. DEATER: No, Your Honor.

THE COURT: All right. You may step down. Does that conclude the testimony?

MR. HARRINGTON: It does, Your Honor.

THE COURT: All right. Let me tell you what I thought I would do, and I'll give you my preliminary ruling so then you'll know what do argue about.

None of the testimony you put on, Mr. Harrington, changes the analysis under the briefing or the pre-sentence report. Correct?

MR. HARRINGTON: That's correct, Your Honor.

THE COURT: All right. In order to find that Mr. Rodriguez [*sic*] is an armed career criminal, I would have to be able to include in that analysis the State of Washington's convictions for drug offenses. The statute prescribes the drug offense and carries a five-year penalty. And it's—the number is—the Washington statute ends in the number 401, I think. And then in a subsequent penalty provision ending in I think number 408, if a person has been convicted of a previous offense, then the sentence is doubled. And so the question is because he received and was sentenced under the ten-year provisions whether or not those become drug offenses for which [491] there's been an—either a controlled substance or crime of violence where the sentence was ten years or more.

I find that I'm bound by the *Corona* decision out of the en banc panel of the Circuit, which took a statute in California that made the penalty for petty theft six months if it was the first offense and then, in a different statute, increased that if it was more than a first offense to a year; and the Circuit had to determine whether the person who had been convicted a second time and therefore received the year sentence would have their—I think the question was whether it was an aggravated felony, because with the sentence being a year or more, it met the definition the Circuit was trying to apply and concluded that you had to use the statute of conviction.

There's an unpublished opinion after that that seems to distinguish *Corona* where the penalty provision is in the same statute. It's unpublished, so we can't cite it. But it seems to be *Corona* tells me that in Washing-

ton, the drug offenses are five year offenses and that the Court, under *Corona*, cannot look to the enhancement that's done. It must look at the five years, which makes them then not applicable as armed career criminal as a matter of law under that provision; and so he would not be an armed career criminal.

The second question I had to address was criminal history. I don't find that the driving without a license is governed by [492] the driving while license suspended case of *Redmond v. Moore* and, if it were, that the factual basis I have and the burden to show that the offense shouldn't apply is on the defendant and has not been met. So I would deny the request that I not count that offense.

I also find that two of the State of Washington offenses, 95-1-01071-8 and 95-1-01070-0, are unrelated; and that results in a base offense level of 24. I find that I cannot use the fact that the firearm was stolen or obliterated because of the *Blakely* decision. That would have had to have been presented to a jury. The case was tried, of course, before that decision; but the jury was not asked to do that. So it having not been found beyond a reasonable doubt by a jury, and it would have enhanced the sentence above a base offense level of 24, I'm precluded from doing that as a court as a matter of law.

So it's clear, my finding of him not being an armed career criminal is a decision of law based upon the *Corona* decision. In other words, I find as a matter of law that the Circuit has told me that that's how I should apply that provision. So I'm not making any factual determination against the government or in favor of the plaintiff in that regard. It's based upon the

statute and the *Corona* decision's instructions as to how to do that.

I'm making the same ruling as a matter of law I'm [493] precluded from using the fact that the firearm may have been stolen or obliterated because of *Blakely* and *Ameline*.

The no valid operator's license—it's kind of a mixed question of law and fact. I'm finding the burden hasn't been met as a factual basis; and as a legal basis, I don't think that the case involving the unconstitutionality of driving while license suspended applies to driving without a license.

I also find that *Blakely* does not preclude me as a matter of law from taking into account the dates of any types of convictions that increase the base offense level from 20 to 24, that that doesn't have to be done by a jury, that those convictions and the records of them can be done by the Court.

Based upon the government's concession that one of the convictions in Spokane County, 95-1-01089-1, is related, that would make a criminal history category V with a criminal history of 12, so a base offense level that has not been adjusted for any factual determinations of 24 and a criminal history that's not been adjusted because of the concession by the Government of V, which leaves a sentencing range of 92 to 115 months.

Now, before I turn to you people, have I left anything out, Ms. Robinson?

THE LAW CLERK: No.

THE COURT: All right. I think I tried to cover everything that everybody raised. Now, having done that, the [494] government can proceed.

I don't permit lawyers to ask questions of me very often, but is there anything that I didn't cover or that you don't understand? I'm trying to make a record so that if you choose to take it up, you know what was legal and factual, or, if the plaintiff does, what was legal and factual.

MR. HARRINGTON: Your Honor, I think you've covered all the issues that have been presented.

THE COURT: All right.

MR. HARRINGTON: There's been extensive briefing, and I think the Court has covered it.

Your Honor, just for the record, I want to object to the Court's analysis and legal conclusion regarding the *Corona* case. It's the government's position, consistent with the briefing, that the enhanced penalty provision under the Washington State statutes is not an enhancement but is automatically applied.

THE COURT: How do you distinguish *Corona*?

MR. HARRINGTON: You know, I'm looking at—I'm looking at Washington state law and how they apply—

THE COURT: But if you just look at the two statutes, and one is—if it's a first offense, it's X, and if it's another one, it's Y, how do you distinguish them?

MR. HARRINGTON: You know, I'm not in a position to do that, to distinguish it at this point with respect to [495] *Corona*, because I don't feel like I'm

comfortable enough with the California statutes at this point.

THE COURT: All right.

MR. HARRINGTON: But clearly, it's—

THE COURT: I can't find I can distinguish it, so that's why I asked.

MR. HARRINGTON: Well, so the government wanted to object to that legal conclusion.

Secondly, the government is objecting to the application of *Blakely* with respect to the enhancement for the stolen firearm, understanding that the Court is making that finding as a matter of law and the uncertainty with the *Blakely* decision at this point.

THE COURT: All right.

MR. HARRINGTON: Thank you, Your Honor.

THE COURT: Anything else you want to say about the sentence?

MR. HARRINGTON: Your Honor, it's the government's position the Court should impose the high end, given the nature and circumstances of this case, and given Mr. Rodriguez's [*sic*] extensive and lengthy history.

THE COURT: All right.

MR. HARRINGTON: It's the government's position that if there's ever a career criminal or someone that's made a career out of crime, it's Mr. Rodriguez [*sic*].

[496]

THE COURT: Okay. Would you come up, Ms. Deater and Mr. Rodriguez [*sic*].

Mr. Rodriguez [*sic*], have you gone over the presentence report with Ms. Deater?

THE DEFENDANT: Yes, I have.

THE COURT: Do you have any changes or additions you want to make other than those have been thoroughly addressed by her?

THE DEFENDANT: No, Your Honor.

THE COURT: Anything you'd like to say prior to sentence?

THE DEFENDANT: Well, all I've got to say, Your Honor, is that it just took me a little longer than the average person to finally grow up. And I was headed in the right direction when this happened. So—you know—things happened in my past that have been biting me on the butt ever since I've been in trouble, from the littlest things to the biggest things. You get pulled over; and they open the—and the computer comes on with your prior history, and you're already in trouble. All I got to say is that—you know—that I found Jesus Christ. That's pretty much—strange enough.

MS. DEATER: Ms. Deater?

MS. DEATER: Your Honor, much of our time has been put into the legal issues and addressing and crunching numbers [497] and looking at cases and trying to determine statutes. And I'm concerned that we haven't spent enough time addressing the Court in discussing Mr. Rodriguez [*sic*] himself, not just his criminal history and how it fits into the scheme of things

post-*Blakely*, pre-*Blakely*, Washington doubling statute, et cetera.

There are several people in the courtroom today— Mr. Rodriguez's [*sic*] family, his friends—that would like to address the Court. I don't know if the Court is aware or not Mr. Rodriguez [*sic*] was going back to school. He wanted to be a counselor. There was money found by the police when they came into the house. There was money found by the police when they came into the house. There was an assumption that that money was drug money. But there was an envelope from the community college, and there's a lady in the courtroom to testify if—or—to address the Court in regards to her program and that they were helping to fund Mr. Rodriguez [*sic*], to fund his education, that he was going to school. He had goals. He had hopes. He had a direction that he wanted to go to. Notwithstanding everything else, he had hopes; and he had people around him that he cared for and people around that cared for him as well.

I know the Court has a discretion to make a determination where in the standard range to sentence Mr. Rodriguez [*sic*]. I know there is the—it's possible to have this feeling that he dodged a huge bullet, and I'm sure this case will go up to the appellate court. But I think that it's easy to come to that [498] conclusion that he dodged this big bullet. But point of fact is the ACCA cases come down where they come down. The rules come down where they come down on people. Whether they find themselves under the provisions of ACCA or not by a technicality on one side or the other, the fact is ACCA doesn't apply to Mr. Rodriguez [*sic*] because his prior convictions were five-year convictions

and not because they were more. They've been contemplated in the guideline range. They've been contemplated by this Court in the offense level from 20 to 24. And so it's important—and again, I want to reiterate—and I hope I'm not repeating myself, but I find I am—that we want the Court to know more about Mr. Rodriguez [*sic*] than what was heard at trial and what was presented in the pre-sentence report. I didn't notice in the pre-sentence report any discussion about Mr. Rodriguez's [*sic*] goal for going back to school. Mr. Rodriguez [*sic*] has had a drug problem for a long time. I don't believe he's ever been in any inpatient care for that. And when he goes to prison, he intends to go through the drug treatment program—any program that's available to him.

THE COURT: What are you asking me to do?

MS. DEATER: Well, we're asking this Court to sentence Mr. Rodriguez [*sic*] to low end of the range. He's already looking at 92 to 115 months. 92 months is an awfully long time to have. As the jury determined, a gun—

THE COURT: Let me put it differently. Are you [499] asking me to hear testimony, or are you just asking me to know that people are here?

MS. DEATER: I'm asking if the Court—not testimony. But if the Court would allow people to—allow them to just address the Court.

THE COURT: I will. Let me just tell you my situation. Judge Rodriguez is being sworn in to the bench in Seattle this afternoon, and it's a big day because he's Hispanic. I'm going, and my plane is at 1:30. So I can—I don't want to short shrift you, so—I can only give you a short amount of time, but I can also

do this tomorrow. I've made my legal rulings. And if you feel like you can't get it done—I've probably got to leave here in 20 minutes.

MS DEATER: It's important enough, Your Honor, that to have the appropriate amount of time, we'd ask, then, to come back tomorrow.

THE COURT: All right. What time do you have tomorrow, Ms. Fox?

THE COURTROOM DEPUTY: 10:00.

THE COURT: All right. Well, so it's clear, I'm considering these other issues closed. In other words, I'm just talking now between 92 and 115 months. So I don't want to get back in the other stuff. If there's anything about any of the other rulings I've made, I want to hear it today, so that the only thing we're talking about is the standard range. [500] Is that where you are?

MS. DEATER: Yes, Your Honor. At this point, we're only talking about standard range.

THE COURT: Mr. Harrington?

MR. HARRINGTON: I understand the Court's ruling.

THE COURT: All right. Well, I'm going to exercise my discretion to continue it till tomorrow so that you can put on whatever you want to do.

Ms. Fox, what time can we do it?

THE COURTROOM DEPUTY: 10:00 tomorrow.

THE COURT: 10:00.

MS. DEATER: Thank you, Your Honor.

THE COURT: See you in the morning at 10:00.

(The proceedings recessed at 12:20 p.m.)

[501]

CERTIFICATE

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on page i here to; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this *23rd* day of *November*, 2004.

/s/ DEBRA KINNEY CLARK
DEBRA KINNEY CLARK
Official Court Reporter
United States District Court
Eastern District of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 03-CR-142-RHW
Spokane Washington Appeal Transcript

UNITED STATES OF AMERICA, PLAINTIFF

v.

GINO G. RODRIGUEZ [*sic*], DEFENDANT

Sept. 3, 2004
Proceedings

Volume 8

BEFORE THE HONORABLE ROBERT H. WHALEY UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings reported by mechanical stenography; transcript produced by computer-aided transcription.

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[502]

(September 3, 2004; 10:40 a.m.)

THE COURTROOM DEPUTY: We have *United States of America v. Gino Rodriguez* [*sic*], Case No. CR-03-142. Time set for the continuation of the sentencing.

MR. HARRINGTON: Your Honor, this is the continuation of the sentencing hearing yesterday. I think the Court continued it to take testimony from witnesses on behalf of the defense. Just as a housekeeping matter, I want to just clarify for the record, Your Honor, the government did move for the admission of Exhibits No. 1 through 8 yesterday, and I believe that they were, in fact, admitted.

THE COURT: I think they were. If they weren't, I think Ms. Deater said she had not objection.

MR. HARRINGTON: That's correct. Thank you.

THE COURT: So they're admitted now if I didn't do that yesterday.

If we're not done by 11:00, I'm going to have to interrupt to take a civil motion. It shouldn't take long, but I want to get it out of the way. And then we have the rest of the day.

All right. Ms. Deater?

MS. DEATER: Unless any of the parties have an objection, I was just going to call some of the people to the podium to address the Court. I've got a proffer for the Court from Ms. Joyce McKee (phonetic). She works for the Department of Vocational Rehabilitation through SCC. She dealt with [503] Mr. Rodriguez [*sic*] as he went through the motions and the procedures of getting financial aid, getting some other aid—bus passes, some

help for some dental work—to help support him while he was going through school. I've already shown these to the government. I don't believe there's any objection to the simple proffer.

MR. HARRINGTON: Not for the proffer, Your Honor.

THE COURT: All right.

MS. DEATER: May I approach, Your Honor?

THE COURT: Yes.

(Materials were handed to the Court)

MS. DEATER: I would ask Ms. Joyce McKee to come forward to address—

THE COURT: Let me read this first.

MS. DEATER: Okay.

(The Court reviewed materials.)

THE COURT: All right.

MR. HARRINGTON: Your Honor, I would request the witnesses take the witness stand in case there's any questions that the government may want to ask.

THE COURT: Well, what I'll do is I'll let them speak from there; and if you have questions, I'll let you do that.

MR. HARRINGTON: Thank you.

THE COURT: I'd invite Ms. Joyce McKee to address the Court, Your Honor.

[504]

THE COURT: All right. Go ahead. So you understand what we're doing. I've already determined the sentencing range. And you're going to talk to me a minute, but the government may want to put you under oath and ask you questions when we're through.

JOYCE McKEE: Okay.

THE COURT: Okay. Go ahead.

JOYCE McKEE. Gino applied for services through the Division of Vocational Rehabilitation.

THE COURT: What is your name again?

JOYCE McKEE: Joyce McKee.

THE COURT: Okay. Go ahead now.

JOYCE McKEE: Gino applied for services through the Division of Vocational Rehabilitation on July 18th, 2002. He was interested in the field of substance abuse counseling. He expressed an interest in working with troubled youth or alcoholics and substance abusers.

We developed a plan for him to attend Spokane Community College and Spokane Falls Community College to prepare for a career as a substance abuse counselor, working with at-risk youth. He completed two quarters at SCC. He was dedicated to his training program and was most appreciative of the assistance provided by the Division of Vocational Rehabilitation. He was looking forward to having a career. He was very cooperative throughout the time I worked with him.

[505]

And I'll also read a letter that Gino wrote at the time our agency had offered to help him with some dental services.

(Reading) Joyce: I just want to thank you and DVR for wanting to help me with my dental problem. DVR and you have helped me so much. I can't say thank you enough. I just want you to know that I know it's a hand up, not a hand out; and I'm going to use the help and take full advantage to better myself. Thanks to you and DVR. It might not have happened. Thank you, Gino Rodriguez [*sic*].

THE COURT: What is the name of your agency?

JOYCE McKEE: The Division of Vocational Rehabilitation. We're part of the Department of Social and Health Services.

THE COURT: All right. Okay. Any questions of her, Mr. Harrington?

MR. HARRINGTON: No, Your Honor.

THE COURT: All right. Thank you.

ALAN DORENBOS: Good morning, Your Honor. My name is Alan Dorenbos, and I thank you for the opportunity to speak on Gino Rodriguez's [*sic*] behalf.

May I ask Gino a quick question before I begin?

THE COURT: Ask him a question?

ALAN DORENBOS: Yes. It will only take a moment.

THE COURT: You want to go speak to him?

ALAN DORENBOS: Yes. I just have a quick question [506] for him. Yes. If I could.

THE COURT: Do the marshals have any objection?

ALAN DORENBOS: I won't go any farther than that chair, Your Honor.

A DEPUTY MARSHAL: That's fine, Your Honor. Thanks for asking.

(Mr. Dorenbos, the defendant, and Ms. Deater conferred off the record.)

ALAN DORENBOS: My name is Alan Dorenbos. I had the unfortunate experience of spending some eleven and a half years with the Department of Corrections in the State of Washington from a conviction in 1992. And during that time, I had the very fortunate experience of meeting Gino Rodriguez [*sic*], and I would like to tell this Court a little bit about Gino Rodriguez [*sic*].

Before I do that, I would like to just mention something about me to the Court so that you may have a better feeling about me. After my conviction in 1992, I hired a scientist, an audio forensic expert from the Federal Bureau of Investigation, to investigate the alleged— the confession tape—the audio tape recording of the police interrogation that the police took of me and used in court to gain a conviction. That audio investigation has not been completed because since then, on three occasions, the defense counsel, the King County Superior Court, and the prosecuting attorney simultaneously lost the [507] court records, all of the court records; and they don't have any that exist on me. So that is still a continuing thing. So I have perhaps a bit

of unique experience of knowing the extent of the power of the government and some of the things that they can do.

One of the first things I would like to bring to the Court's attention is what is in the pre-sentence report. Although I have not read it, I am quite certain that the State of California knew and that Washington State knew—and—I'm sorry—I don't know what the U.S. attorney's name is. May I ask your name?

MR. HARRINGTON: What difference does it make?

ALAN DORENBOS: And the attorney sitting behind me knows that Mr. Rodriguez [*sic*] suffers from a chemical dependency, and he's had that for quite a number of years. And yet during the entire period of time that he has had incidents with the law enforcement agencies, I don't believe he has received or been put in any chemical dependency program.

At the request of Chief Justice Rehnquist, the president of the American Bar Association, Dennis W. Archer stated that he is in favor of removing the unnecessary legal barriers that prevent released inmates from becoming productive members of society. Right now, the deck is permanently stacked against many of them; and an invisible web of state and federal laws block their path to redemption.

[508]

Gino Rodriguez [*sic*] mentioned briefly yesterday how his past is coming to haunt him or how it's been difficult to break free, and yet he was attending school and trying to overcome those many obstacles which we are faced with. The U.S. Attorney would recommend

that this Court be guided soley by Gino Rodriguez's [*sic*] past; and I would say that this Court should be guided also and perhaps more strongly by Gino Rodriguez's [*sic*] future, because the steps that he took to try to improve himself and improve others were significant, and the obstacles that he faced were significant.

If Gino Rodriguez [*sic*] had been born in Switzerland or Holland or many other parts of Europe, all these documents, all these briefs, all these hearings would never have come to pass, because he would have received treatment early on down in California when he first had incidents with the government in criminal affairs—in what was a criminal event, all related to criminal dependencies. In the words of Judge Gray, it would make no sense to send Robert Downey, Jr., to prison any more than it would be to send Mrs. Gerald Ford to prison for her alcoholism for treatment.

The other thing I'd like to mention is I had an opportunity to live with Gino Rodriguez [*sic*] while in prison for a couple of years. And I think of all the environments that I've been in, that was one of the ones where you can best learn the true nature of a person. I found prison to be an environment [509] where it is oftentimes dominated by fear, us versus them, racial hatred oftentimes supported or encouraged by some DOC staff or some of the guards. At all times in all the things I've seen Gino Rodriguez [*sic*] do while he was in prison, he never exhibited any racism on his sports teams, which I was a party of. There were members of all racial groups, which was extremely rare. He came to the aid of those who were oftentimes somewhat defenseless in that environment. He encouraged people to improve themselves. And in an environment that was

short on integrity, I found Gino Rodriguez [*sic*] to be true to his word. And he is a person that I will always consider a friend.

I would ask this Court to consider that Gino Rodriguez [*sic*] be given the low end of the sentencing range, or less, since I believe that anything that happened began long ago with what began as a chemical dependency on drugs, which we are starting to realize should perhaps be treated by the Surgeon General rather than the Attorney General, but, more than anything else, because of his true nature and character. I don't believe for a moment that he is a career criminal. I don't believe that's in his heart. I don't believe that's in his soul. And the incident where a few hours after a handgun had been delivered and a number of folks showed up from somebody who was attending school to be a counselor—I know that Gino, if he was a participant, was an unwilling participant in that. And I ask [510] the Court for the best that you can do for Gino Rodriguez [*sic*]. Thank you.

THE COURT: Mr. Harrington?

MR. HARRINGTON: Your Honor, I just have a couple short questions of this gentleman.

ALAN DORENBOS: Certainly.

THE COURT: All right. Come on up and take the stand, Mr. Dorenbos.

THE WITNESS: Thank you.

THE COURTROOM DEPUTY: Sir, would you raise your right hand?

(WITNESS, ALAN DORENBOS, called as a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:)

THE COURTROOM DEPUTY: Have a seat. And if you could spell your first and your last name for us, please, for the record.

THE WITNESS: My name is Alan, A-l-a-n, Dorenbos, D-o-r-e-n-b-o-s.

DIRECT EXAMINATION

BY MR. HARRINGTON:

Q. Mr. Dorenbos, just for the record, are you a chemical dependency counselor?

A. No.

Q. Do you work in the chemical dependency field?

A. No.

[511]

Q. Do you have any training or experience in that field?

A. No.

Q. So when you were making your assertions that Mr. Rodriguez [*sic*] has a chemical dependency, is that just based on your personal opinion?

A. No.

Q. And what training and experience is that based on?

A. The information that I received from counselors at the Department of Corrections in Airway Heights. Listening to also their recommendations for Gino Rodriguez [*sic*]. That was their expert opinion.

Q. All right. So you're relying on hearsay—information provided from them?

A. No. I heard it from them directly.

Q. Okay. So from other people. And do you know what their training and experience is in chemical dependency matters?

A. Extensive. That was their job.

Q. Okay. And you know that for sure?

A. Yes.

Q. All right. What other—can you just describe what your conviction is for?

A. Second-degree murder.

Q. And do you have any other prior convictions, or is that—

A. None.

Q. That's the only one. And was that second-degree murder [512] conviction out of King County?

A. Yes.

Q. Is that right? And you also said that Mr. Rodriguez [*sic*] was attending school to become a drug dependency counselor. Is that your understanding?

A. Yes.

Q. Do you know at the time of his arrest, he was in possession of heroin?

A. Yes.

Q. And—

A. I heard that that was said to be found in—somewhere.

Q. Okay. And you said that you don't—wouldn't describe Mr. Rodriguez [*sic*] as a career criminal; is that right?

A. Absolutely not.

Q. Are you aware of what his entire criminal history is?

A. Absolutely.

Q. Do you know all of the convictions that Mr. Rodriguez [*sic*] has?

A. I believe I've heard most of them from sitting in here.

Q. Okay. And other than what you're heard here in the courtroom, are you aware of any other convictions that Mr. Rodriguez [*sic*] has had?

A. No.

MR. HARRINGTON: I don't have any further questions. Thank you, Your Honor.

[513]

THE COURT: All right. Counsel?

MS. DEATER: None, Your Honor.

THE COURT: All right. You're excused.

THE WITNESS: Thank you.

THE COURT: Anything else?

MS. DEATER: We'd rest, Your Honor.

Your Honor, again, as we said yesterday, and we'll get to the point, we don't want the Court to forget about Gino as a person. Again, we spent so much time briefing this issue—

THE COURT: I need you to talk a little louder.

MS. DEATER: Again, we spent so much—

THE COURT: What I'm going to do—Ms. Fox, would you go in and—can you have Nancy or somebody get on that conference call? I'm not—

MS. DEATER: I understand.

THE COURT: I don't want to prevent you from making all the argument you want. So if I can get on the conference call and tell them to wait or call back in 15 minutes, that would then give you whatever you need.

MS. DEATER: Thank you, Your Honor.

THE COURT: All right. Go ahead.

MS DEATER: We didn't want the Court to lose sight of who Mr. Rodriguez [*sic*] is as a person, not just his criminal history, not just what's contained in the

PSR, not just the indictment, not just the conviction. [514]

I worked with Mr. Rodriguez [*sic*] for several months on this. It's been very emotional. Mr. Rodriguez [*sic*]—what you don't think about frequently is the stress somebody goes through when they're dealing with the fear of spending possibly the rest of their lives behind bars. I've worked with—I don't think I've worked with many people that were facing as much time as Mr. Rodriguez [*sic*]. And I have to say, in my opinion, Mr. Rodriguez [*sic*] is quite a courageous individual. He dealt with—he dealt with all of this with grace. And he's had many friends and family members calling frequently, visiting frequently in support of him. He has many connections to family and friends. That tells you something about Mr. Rodriguez [*sic*]—not that—he wasn't alone while he was sitting at the county jail, waiting for his sentencing.

Zach Putnam is—was a young man that lived with Mr. Rodriguez [*sic*] for a period of time—Tammi Putnam's son. Tammi Putnam is Mr. Rodriguez's [*sic*] daughter (sic). She's present in the court in support of Mr. Rodriguez [*sic*]. Mr. Putnam wrote a letter to Mr. Rodriguez [*sic*], and I'll summarize it briefly. It's several paragraphs long. It's basically telling Mr. Rodriguez [*sic*] he was the only father that he's ever really known and that he thanked Mr. Rodriguez [*sic*] for supporting him and encouraging him to be all that he could be. And right now, Mr. Putnam is in college in Tulsa, Oklahoma; and we thought it was important for the Court to recognize that he has Mr. Putnam's support as [515] well.

In the end, Your Honor, based on what the Court heard, based on what the jury heard during the trial, I don't think it's unfair to summarize the evidence as showing that the firearm was in the apartment for probably less than 48 hours. I don't believe there was any testimony to say that Mr. Rodriguez [*sic*] had gone out to procure a firearm but, rather, it had been brought to the house by the young men. 92 months is a long time for that, Your Honor. Mr. Rodriguez [*sic*] understands that's part of the standard range that the Court is considering. We would maintain to the Court that 92 months is a sufficient penalty for the crime the jury found Mr. Rodriguez [*sic*] guilty of, and we'd ask the Court to impose the low end of the sentencing range.

THE COURT: Anything you want to say, Mr. Rodriguez [*sic*]?

THE DEFENDANT: Everybody pretty much summed it up. I've learned from this experience. I'll tell you that.

THE COURT: I had a man earlier today who was found to be an armed career criminal. And looking at it, I told him—and I guess in trying to determine what to do in the standard range with you, one of the things that I consider is: Do I think somebody is dangerous? Because when I—I sort of divide sentencing up into a number of different categories, not that I get to say a whole lot about it because the guidelines pretty much govern it. But one is: What's needed to get this [516] person not to offend again? And I think many times the sentences may be longer than is necessary for that if you're trying to get someone's attention and show them there's consequences. That's one. And another is to prevent other people from committing offenses. And

one is where there are victims to crimes, their need for retribution. Those usually involve some sort of crime of violence or some crime against an individual as opposed to a status crime like this. And then the other is: Is the person dangerous? If they're dangerous, then there's a desire to put them away for a longer period of time to protect society from them ever doing that again.

I've thought back on the facts of your conviction and your criminal history. And to the extent you're dangerous because it's predicted by your history, it doesn't cause me to think that 92 months isn't appropriate. That's a long time. So I'm going to sentence you to 92 months. I'm going to put you on supervised release for three years. I'm going to waive the fine and impose a $100 special penalty assessment.

Now, what that means is that during that three-year period, you're going to be under the jurisdiction of the probation department; and it will include drug treatment, drug analysis, urinalysis, a provision that you can be searched in your person and in your home and car to see if you're in compliance with the orders of the Court. You'd be subject to mental health counseling and treatment if it's found [517] appropriate.

I'll recommend that you get drug treatment while you're incarcerated. I'm not sure it will make any difference in the amount of time you'll do. But it would—to the extent your problem is drug related, which it seems that's one of your problems, that possibly can be addressed.

Have I left anything out besides the right to appeal, Counsel? Ms. Petretee?

THE PROBATION OFFICER: No, Your Honor.

THE COURT: You have a right to appeal this sentence. If you don't appeal it within ten days, you lose that right. You have a right to appeal your conviction as well. You have a right to a transcript of the proceedings necessary to take your appeal, and all of that would be provided at no expense to you if you can't afford it; and Ms. Fox would file a notice of appeal for you today if you asked.

Anything further?

MS. DEATER: No, Your Honor. Thank you.

THE COURT: Court's in recess.

(The proceedings recessed at 11:10 a.m.)

[518]

CERTIFICATE

I, DEBRA KINNEY CLARK, do hereby certify:

That I am an Official Court Reporter for the United States District Court at the Eastern District of Washington;

That the foregoing proceedings were taken on the date and at the time and place as shown on page i hereto; and

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this *23rd* day of *November*, 2004.

/s/ DEBRA KINNEY CLARK
DEBRA KINNEY CLARK
Official Court Reporter
United States District Court
Eastern District of Washington

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Case Number: 2: 03CR00142-001
USM Number: 10756-085

UNITED STATES OF AMERICA

v.

GINO G. RODRIQUEZ

[Filed: Sept. 15, 2004]

JUDGMENT IN A CRIMINAL CASE

☐
☐

THE DEFENDANT

☐ pleaded guilty to count(s) _____
☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
☒ was found guilty on count(s) 1 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm	04/01/03	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)
☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/3/2004
Date of Imposition of Judgment

/s/ *ILLEGIBLE*
Signature of Judge

The Honorable Robert H. Whaley
Name and Title of Judge

Judge, U.S. District Court

September 15, 2004
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 92 month(s)

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends defendant participate in drug and alcohol treatment program while incarcerated pursuant to U.S. Bureau of Prisons guidelines.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 year(s)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as

directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of and contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

14. You shall provide the supervising probation officer with access to any requested financial information, including authorization to conduct credit checks and obtain copies of your Federal income tax returns. You shall disclose all assets and liabilities to the supervising probation officer. You shall not transfer, sell, give away, or otherwise convey any asset, without the advance approval of the supervising probation officer.

15. You shall undergo a substance abuse evaluation and, if indicated, enter into and successfully complete an approved substance abuse treatment program, including aftercare. You shall contribute to the cost of treatment according to your ability. You shall allow full reciprocal disclosure between the supervising probation officer and treatment provider.

16. You shall abstain from the use of illegal controlled substances, and shall submit to urinalysis testing, as directed by the supervising probation officer.

17. You shall submit your person, residence, office, or vehicle to a search, conducted by a U.S. probation officer, at a sensible time and manner, based upon reasonable suspicion of contraband or evidence of violation of a condition of supervision. Failure to submit to search may be grounds for revocation. You shall warn persons with whom you share a residence that the premises may be subject to search.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00		

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All

criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case numbers (including defendant number) and Defendant and Co-Defendant Names, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS
(Not for Public Disclosure)

☐ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE.

OR

☒ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES: (Use Page 3, if necessary.)

- ☐ **Chapter Two of the U.S.S.G. Manual** determinations by court (including changes to base offense level or specific offense characteristics):
- ☐ **Chapter Three of the U.S.S.G. Manual** adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):
- ☒ **Chapter Four of the U.S.S.G. Manual** determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ **THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS** (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including para-

graphs in the presentence report.) (Use Page 3, if necessary.)

GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):

Total Offense Level: 24

Criminal History Category: V

Imprisonment Range: 92 to 116 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 10,000 to $ 100,000

☒ Fine waived or below the guideline range because of inability to pay.

☒ **THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.**

OR

☐ **THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS:** (Use Page 3, if necessary.)

STATEMENT OF REASONS
(Not for Public Disclosure)

ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES
(If necessary.)

The Court found that the defendant was not an armed career criminal because the predicate offenses did not qualify under federal law. United States v. Corona-Sanchez, 222 F.3d 1201 (9th 2002). The Court did not apply the enhancement for a stolen gun pursuant to Blakely v. Washington, 124S.Ct. 2531 (2004).

SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS
(If necessary.)

ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT
(If necessary.)

ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE
(If necessary.)

Defendant's Soc. Sec. No.:	[REDACTED]
Defendant's Date of Birth:	[REDACTED]
Defendant's Residence Address:	Spokane County Jail Spokane, WA 99260
Defendant's Mailing Address:	Same as above

9/3/2004
Date of Imposition of Judgment

/s/ *ILLEGIBLE*
Signature of Judge

The Honorable Robert H. Whaley Judge, U.S. District Court Name and Title of Judge

September 15, 2004
Date Signed

On the page that has statement of reasons, additional presentence report and guideline application changes. Put the following.

The Court found that the defendant was not an armed career criminal because the predicate offenses did not qualify under federal law. United States v. Corona-Sanchez, 222 F.3d 1201 (9th 2002). The Court did not apply the enhancement for a stolen gun pursuant to Blakey v. Washington, 124 S. Ct. 2531 (2004).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CR-03-142-RHW

UNITED STATES OF AMERICA, PLAINTIFF

v.

GINO G. RODRIQUEZ, DEFENDANT

[Filed Sept. 3, 2004]

SENTENCING ORDER

A sentencing hearing was held on September 2, 2004, in Spokane, Washington. Defendant was convicted by jury trial to one Count of Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g). Defendant objects to being classified as an Armed Career Criminal, arguing that his two prior California Convictions for Residential Burglary do not qualify as predicate offenses, nor do his three Spokane County drug convictions. This order memorializes the Court's oral ruling.

DISCUSSION

The Armed Career Criminal enhancement is found in both the United States Criminal Code and the United States Sentencing Guidelines. The statute provides that a person who violates § 922(g) (felon in possession of a firearm) and has three previous convictions for a violent felony or serious drug offense, committed on occasions different from one another, shall receive a minimum 15-year sentence. 18 U.S.C. § 924(e)(1). "Serious drug of-

fense" is defined as: (i) a federal offense under the Controlled Substance Act for which a maximum term of imprisonment of 10 years or more is prescribed by law; or (ii) a state offense involving the manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance for which a maximum term of imprisonment of 10 years or more is prescribed by law. 18 U.S.C. § 924(e)(2)(A). A "violent felony means any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Under 4B1.4 of the United States Sentencing Guidelines, a defendant who meets the criteria of 18 U.S.C. § 924(e) is considered an Armed Career Criminal. U.S. Sentencing Guidelines Manual § 4B1.4 (2003).

In determining whether a particular prior offense qualifies as a predicate offense for the Armed Career Criminal enhancement, the court engages in a categorical analysis, in that the court does not examine the facts underlying the prior offense, but "looks only to the statutory definitions of the prior offenses." *Taylor v. United States*, 495 U.S. 575, 600 (1990); *United States v. Wofford*, 122 F.3d 787, 792 (9th Cir. 1997). If the statute criminalizes conduct that would not constitute a "violent felony," the conviction may not be used for sentence enhancement, unless the record includes "documentation or judicially noticeable facts that clearly establish that the conviction is a predicate conviction for enhancement

purposes." *United States v. Potter*, 895 F.2d 1231, 1237 (9th Cir. 1990).

In *Taylor*, the Supreme Court held that the definition of burglary, as used in § 924(e), contains at least the following elements: (1) an unlawful or unprivileged entry into, or remaining in, a building or other structure, (2) with intent to commit a crime. 495 U.S. at 599. Thus, for purposes of a § 924(e) enhancement, if a person has been convicted of burglary, where the statutory definition of burglary includes the basic elements of unlawful or unprivileged entry into or remaining in, a building or structure, with intent to commit a crime, that conviction will qualify as a predicate offense in determining whether a person is an Armed Career Criminal for sentencing purposes.

A. California Convictions

In 1980 and 1982, Defendant was convicted of Residential Burglary in the Superior Court of Kings County, California. Although § 459 of the California Penal Code has been amended since 1980 and 1982, the basic definition of burglary has not changed. Section 459 provides that:

> Every person who enters any house, room, apartment . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.

Cal. Pen. Code § 459 (2004).

Courts interpreting § 459 of the California Penal Code have held that this statute does not qualify as a "violent felony" under the strict categorical approach approved in *Taylor*. *United States v. Parker*, 5 F.3d

1322, 1324 (9th Cir. 1993). These courts then engaged in a "modified categorical" approach in which the courts looked at other documents and judicially-noticeable facts to determine whether the offense was within the Guidelines' definition. *Id.*; see also *United States v. Shumate*, 329 F.3d 1026, 1029 (9th Cir. 2003). If the statute, together with other documents and the judicially-noticeable facts, demonstrates that the defendants could have been "convicted of an offense other than that defined as a qualifying offense," the offense cannot be used to enhance defendant's sentence. *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004).

1. Defendant's 1980 California Conviction

The Government provided certified copies of documents relating to Defendant's 1980 conviction (Ct. Rec. 70, Attach. D), including the 1980 Amended Information and copies of the abstract of Defendant's arraignment, the State's motion to file the amended Information, Defendant's plea to the charged burglary, and the Commitment and Sentence.

The Amended Information charges in Count 1 that Defendant "did willfully, unlawfully and feloniously, in the nighttime, enter the inhabited dwelling house of Ernest Filippi located at 1504 Middleton, Hanford, with intent to commit theft." Defendant pleaded guilty to Count 1 as charged in the Amended Information. In doing so, Defendant pleaded guilty to unlawfully entering a dwelling house with intent to commit theft, which are the elements that make up the generic definition of burglary. The documents do not demonstrate that Defendant could have been convicted of an offense other

than that defined as a qualifying offense. As such, Defendant's 1980 Calilfornia conviction qualifies as a predicate offense.

2. Defendant's 1982 California Conviction

The Government provided certified copies of documents relating to Defendant's 1982 conviction (Ct. Rec. 70, Attach. E), including the 1982 information and copies of the abstract of Defendant's bail reduction motion, Defendant's plea to the charged burglary, the Probation Office's Recommendation for an Aggravated Sentence, and the abstract of the Judgment imposed.

The Information charges in Count 1 that Defendant "did willfully, unlawfully and feloniously, enter the inhabited dwelling house of M.W. Wolfe, located at 1209 N. Ridengton, Hanford, with intent to commit theft." Defendant pleaded guilty to Count 1. Although the guilty plea did not specifically refer to the Information, it is implicit in the documents that Defendant was pleading to the charge contained in Count 1 of the Information. In doing so, Defendant pleaded guilty to unlawfully entering a dwelling house with intent to commit theft, which, like the 1980 conviction, are the elements that make up the generic definition of burglary. The documents do not demonstrate that Defendant could have been convicted of an offense other than that defined as a qualifying offense. As such, Defendant's 1982 California conviction qualifies as a predicate offense.

The Court finds that the 1980 and 1982 convictions qualify as predicate offenses for purposes of determining whether Defendant is an Armed Career Criminal.

B. Spokane County Convictions

On November 16, 1995, Defendant was convicted under three separate causes of actions for drug offenses that were related to a series of drug transactions that took place in March of 1994, and between October 1994 and January 1995. In each case, Defendant pleaded guilty to violating Wash. Rev. Code § 69.50.401. The maximum penalty for a violation of § 69.50.401 is five years. Under Washington law, however, if a person is convicted of "a second or subsequent offense" relating to narcotic drugs, the maximum penalty is 10 years. Wash. Rev. Code § 69.50.408.[1] This is referred to as the "doubling statute."

The question then is whether, when applying 18 U.S.C. § 924(e), the Court should consider the maximum penalty as provided in the statute of conviction, or consider the maximum penalty that is a result of a sentencing enhancement or doubling statute. In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002), the Ninth Circuit, using the *Taylor* categorical approach, [2]

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[1] "(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

[2] The Ninth Circuit has applied *Taylor's* categorical approach in a variety of sentencing contexts. *See, e.g., United States v. Martinez*, 232 F.3d 728-33 (9th Cir. 2000) (career offender status pursuant to U.S.S.G. § 4B1.1); *United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172 (9th Cir. 2000) (aggravated felony pursuant to U.S.S.G. § 2L1.2(b)(1)(A)); *United States v. Sandoval-Barajas*, 206 F.3d 853, 855-56 (9th Cir. 2000) (same); *United States v. Casarez-Bravo*, 181 F.3d 1074, 1077 (9th Cir. 1999) (career offender status pursuant to U.S.S.G. § 4B1.1); *United States v. Bonat*, 106 F.3d 1472, 1475 (9th Cir. 1997) (predicate offense under the Armed Career Criminal Act).

addressed a similar issue in determining whether a California conviction for petty theft constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). *Id.* In that case, the defendant's conviction of petty theft carried a maximum penalty of six months.[3] *Id.* at 1207. Under the Sentencing Guidelines, a defendant's prior conviction for petty theft would qualify as an aggravated felony if the term of imprisonment was at least one year. 8 U.S.C. § U.S.C. 1101(a)(43)(G). The defendant, however, received a two-year sentence, due to the application of California Penal Code § 666, which sets forth a sentence enhancement for recidivists.[4] *Id.* In applying the *Taylor* categorical approach, the Circuit separated the recidivist enhancement from the underlying offense, and only considered the maximum possible sentence for the offense of conviction. *Id.* at 1210 ("*Taylor* required us to examine the prior crimes by considering the statutory definition of the crimes categorically, without reference 'to the particular facts underlying those convictions.'") (citations omitted). The Circuit concluded that, on its face, the statute defining the crime of petty theft did not qualify as an aggravated felony under the federal sentencing law. *Id.* at 1211. In rejecting the Gov-

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[3] Although it was not clear in the presentence report, the Circuit concluded that the defendant was convicted of violating California Penal Code § 484(a), which is the general California theft statute. *Id.* at 1206.

[4] Section 666 provides: "Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison."

ernment's argument that the defendant's conviction for petty theft qualified as an aggravated felony, the Circuit stated that "under the categorical approach, we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209.

The Court does not see any distinction between the application of § 666 of the California Penal Code to a violation of § 484(a) and the application of Wash. Rev. Code § 69.50.408 to a violation of §69.50.401. In both cases, the application of the separate sentencing statute[5] does not alter the maximum sentence available for the crime itself. In this case § 69.50.401 does not qualify as a predicate offense because the maximum term of imprisonment for violation of this statute does not meet the statutory definition of a predicate offense, as defined in

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[5] The Court notes that, in an unpublished opinion with a somewhat similar scenario, the Circuit reached a different result. See *United States v. Perez*, 2002 WL 31808370 (9th Cir. Dec. 11, 2002). In that case, the Circuit concluded that because the statutory scheme mandated a sentence in excess of one year for a repeat vehicle theft offender, the prior conviction for a theft offense qualified as an aggravated felony. *Id.* at *1. There, however, the crime of conviction, California Penal Code § 10851, fit within the "generic sense in which the term [theft offense] is now used in a criminal code of most States." *Id.* In addition, § 10851 provided for a penalty enhancement for repeat offenders, which increased the maximum penalty beyond the required year. *Id.* Contrast that case to the present case, as well as to another unpublished opinion where the sentencing enhancements are found in separate sections of the criminal code and are not referenced by the statute of conviction. See *Contreras-Castillo v. Ashcroft*, 2003 WL 21153490 (9th Cir. May 16, 2003). In *Contreras-Castillo*, the Circuit reiterated its rule established in *Corona-Sanchez* that only the statute of conviction should be considered without reference to other provisions that enhance the permissible and imposed sentence. *Id.* at *1.

the United States Code. 18 U.S.C. § 924(e) states that a "serious drug offense" is one that involves the manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance, for which a maximum term of imprisonment of ten years or more is prescribed by law.

Here, § 69.50.401 states that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, and sets the maximum term of imprisonment at five years. Wash. Rev. Code § 69.50.401. Thus, on its face, the statutory definition of Defendant's prior drug offenses do [*sic*] not meet the criteria for a predicate offense for purposes of the armed career criminal enhancement. Accordingly, under *Corona-Sanchez*, the Court need look no further. See *Corona-Sanchez*, 291 F.3d at 1213 ("[E]ven if the relevant documents were to establish the substantive elements of the generic crime, the offense of which [defendant] was convicted would still not constitute an aggravated felony because it fails to meet the one-year sentence requirement of § 1101(a)(43)(G).").

The Government argues that § 69.50.408 is neither discretionary nor a sentence enhancement but, rather, is a provision that automatically doubles the statutory maximum sentence for convictions under § 69.50 when the defendant has a second or subsequent conviction under that statute. Even if the Government does not want to call § 69.50.408 a sentencing enhancement, it clearly is meant to address the issue of recidivism. As the Supreme Court clearly stated, "recidivism does not relate to the commission of the offense." *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 230, 239-47

(1998) (concluding that a penalty provision that authorizes a court to increase the sentence for a recidivist does not define a separate crime). The Government's labeling of the statute as non-discretionary and not a sentencing enhancement does not affect the analysis. Indeed, in *Corona-Sanchez*, § 666 of the California Penal Code could arguably be categorized as a non-discretionary sentencing statute. Even so, the Circuit declined to consider this section when determining whether a predicate offense qualified as an aggravated felony.

In sum, Defendant's two prior California convictions for residential burglary do qualify as predicate offenses under the Armed Career Criminal enhancement. In order for the enhancement to apply, however, Defendant must be convicted of three qualifying predicate offenses. Because the Washington convictions do not meet the statutory definition of a predicate offense, the Armed Career Criminal enhancement should not be applied in this instance.

IT IS SO ORDERED. The District Court Executive is directed to enter this order and to provide copies to counsel and U.S. Probation.

DATED this 3 day of September 2004.

/s/ ILLEGIBLE
ROBERT H. WHALEY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-30397, 04-30494

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLEE

Argued and Submitted: Jan. 23, 2006
Filed: Oct. 5, 2006

Before: RAWLINSON and CLIFTON, Circuit Judges, and MARSHALL,* Senior District Judge.

RAWLINSON, Circuit Judge:

A jury convicted Gino Rodriquez of being a felon in possession of a firearm. On appeal, he argues that the district court erred in denying his motion to suppress the firearm because consent to search was not voluntary. He also contends that there was insufficient evidence to support his conviction. On cross-appeal, the

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* The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of Columbia, sitting by designation.

government maintains that the district court erroneously concluded that Rodriquez's prior drug convictions do not qualify as predicate offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). We conclude that the search was conducted pursuant to a valid consent; there was sufficient evidence to support the jury's finding that Rodriquez possessed the firearm; and the district court—relying on *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc)—correctly held that Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA. We therefore affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Gino Rodriquez has several felony convictions in Washington State, including three convictions for delivery of a controlled substance. Rodriquez served his time and, upon his release, was placed on a term of community supervision, from which he absconded. He was subsequently placed on "escape status," and four warrants were issued for his arrest. His whereabouts were unknown until April 2003, when law enforcement officers located and arrested him.

Rodriquez was staying with Tammi Putnam in apartment 36 of an apartment complex in Spokane, Washington. Rodriquez had a key to the apartment, had access to the entire apartment, had his belongings there, and received mail there. Rodriquez and Tammi resided with Tammi's daughter and teenaged son, Zachary.

In March 2003, Zachary's friend, William Packer, spoke to Rodriquez about "getting rid" of a gun. Rodri-

quez told Packer that he could "get rid" of it. Packer brought the gun to the apartment for Rodriquez. Rodriquez looked at the gun, grabbed it with his shirt, pulled the gun out of the sleeve and replaced it. Rodriquez kept the gun, telling Packer that he would try to sell it. Zachary later observed Rodriquez in the apartment with the gun on a table. When Zachary asked about the gun, Rodriquez stated that he was "getting rid of it."

Meanwhile, a joint fugitive task force was looking for Rodriquez and conducting surveillance of Deanna Torgeson, whom the task force had learned was visiting Rodriquez on a regular basis. In April 2003, task force officers followed Torgeson to the apartment complex where Rodriquez resided. They observed Torgeson talking to Rodriquez right outside the rear, open door of apartment 36, while Rodriquez was eating a bowl of cereal.

Spokane County Sheriff Deputy Kris Thompson arrested Rodriquez pursuant to four outstanding warrants for his arrest. Deputy Thompson found a bag of heroin and approximately $900 dollars in cash when Rodriquez was searched. After Deputy Thompson administered the *Miranda* warnings, which Rodriquez waived, Rodriquez denied living in apartment 36. Rodriquez also made other statements that, according to Deputy Thompson, "didn't quite match up," including conflicting stories about how he arrived at the apartment.

At this point, Tammi arrived on the scene. When Deputy Thompson asked her whether she lived in apartment 36 and whether she knew Rodriquez or Torgeson, she responded that she did not live in that apartment, she did not know Rodriquez or Torgeson, and she was at

the complex to pick up her child. She then entered apartment 35.

After conversing with the resident of apartment 35, Deputy Thompson discovered that Tammi had not been forthright. He confronted Tammi with her earlier statements, which she confessed were false. He advised her that "it was a criminal offense to make a false or misleading statement to a public servant." During the course of their conversation, she seemed "nervous" and "upset." Deputy Thompson explained that Rodriquez had been arrested and told Tammi that a warrant could be obtained to search the apartment, in which case the apartment would be secured to ensure the integrity of its contents. Alternatively, she could consent to a search. Deputy Thompson informed Tammi that she had the right to refuse to consent and read to her a search consent card, which she reviewed, signed, and dated. Upon receiving her consent, the officers searched the apartment, where they discovered the gun underneath a couch.

Rodriquez was charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). He moved to suppress evidence seized during the search, asserting that Tammi's consent was not voluntary. The district court denied the motion, and Rodriquez was convicted by a jury.

Rodriquez also objected to the government's request that the judge enhance his sentence under the ACCA. He contended that his two prior burglary convictions and three prior drug convictions did not qualify as predicate offenses under the ACCA. The district court concluded that Rodriquez's prior burglary convictions qualified as two predicate offenses; however, rely-

ing on *Corona-Sanchez*, the district court held that the ACCA enhancement did not apply because Rodriquez's prior drug convictions did not qualify as predicate offenses. This timely appeal and cross-appeal followed.

II

DISCUSSION

A. The Motion to Suppress Was Properly Denied Because Tammi Putnam Voluntarily Consented to the Search of Apartment 36

"We review de novo the district court's denial of a suppression motion. The district court's underlying factual finding that a person voluntarily consented to a search is reviewed for clear error." *United States* v. *Pang*, 362 F.3d 1187, 1191 (9th Cir. 2004) (citations omitted).

"It is well settled that a search conducted pursuant to a valid consent is constitutionally permissible." *United States* v. *Soriano*, 361 F.3d 494, 501 (9th Cir. 2004) (citation and internal quotation marks omitted). "Whether consent to search was voluntarily given is to be determined from the totality of all the circumstances. It is the government's burden to prove that the consent was freely and voluntarily given. On appeal, evidence regarding the question of consent must be viewed in the light most favorable to the fact-finder's decision." *Id.* (citations and internal quotation marks omitted).

"Our cases have identified five factors to be considered in determining the voluntariness of consent to a search. They are: (1) whether the defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4)

whether the defendant was notified that she had a right not to consent; and (5) whether the defendant had been told a search warrant could be obtained." *Id.* at 502 (citations and internal quotation marks omitted). "No one factor is determinative in the equation. It is not necessary to check off all five factors, but many of this court's decisions upholding consent as voluntary are supported by at least several of the factors. Nevertheless, these factors are only guideposts, not a mechanized formula to resolve the voluntariness inquiry." *Id.* (citations and internal quotation marks omitted).

Based on the totality of the circumstances and after considering the applicable factors, we conclude that Tammi voluntarily consented to the search. As to the first factor, the district court concluded, and Rodriquez conceded in his brief, that Tammi was not in custody when she consented to the search. Second, the court determined that there was no "indication that firearms were exhibited or drawn," a conclusion with which Rodriquez also agreed. Third, because Tammi was not in custody, "*Miranda* warnings were inapposite . . ." *Id.* at 504 (citation omitted). Fourth, the court found, and Rodriquez acknowledged, that Tammi knew she had the right to refuse consent. "Knowledge of the right to refuse consent is highly relevant in determining whether a consent is valid." *Id.* (alteration and citations omitted). Moreover, where, as here, "*the officers themselves* informed [Tammi] that she was free to withhold her consent," "the probability that their conduct could reasonably have appeared to her to be coercive" is "substantially lessened." *United States v. Mendenhall*, 446 U.S. 544, 559, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (emphasis added).

Fifth, Deputy Thompson told Tammi that, if she chose not to consent, he could apply for a search warrant and secure her apartment. A "statement indicating that a search warrant would likely be sought and the [apartment] secured could not have, by itself, rendered [Tammi's] consent involuntary as a matter of law." *United States v. Whitworth*, 856 F.2d 1268, 1279 (9th Cir. 1988) (citations omitted). Rather, application of this factor "hinges on whether [Tammi was] informed about the possibility of a search warrant in a threatening manner." *Soriano*, 361 F.3d at 504 (citations omitted). "Even assuming, however, that [Deputy Thompson's statements] were made in a threatening manner so as to imply the futility of withholding consent, when probable cause to justify a warrant exists, the weight of the fifth factor is significantly diminished." *Id.* at 504-05 (citations omitted).

Probable cause to justify a warrant existed in this case. "Probable cause exists when there is a fair probability or substantial chance of criminal activity. It is well-settled that the determination of probable cause is based upon the totality of the circumstances known to the officers at the time of the search." *Id.* at 505 (citations and internal quotation marks omitted).

Prior to the search, the officers knew the following: Rodriquez had absconded from his supervision, and there were four outstanding warrants for his arrest; he was found standing right outside an open door to an apartment eating a bowl of cereal; he denied residing at the apartment, but two people independently confirmed that he resided there; he provided an implausible explanation for how he arrived at the apartment; he attempted to distance himself from the apartment; and he

was in possession of "a considerable size chunk of heroin" and approximately $900 dollars in cash. This collection of facts implies a fair probability of criminal activity resulting in probable cause, thereby significantly diminishing the weight of the fifth factor. See *id.*

The voluntary consent analysis does not automatically end here, however, because the five factors articulated in *Soriano* are not exhaustive. *Id.* at 502. In addition to the five factors, "execution of a consent form is one factor that indicates that consent was voluntary." *United States v. Childs*, 944 F.2d 491, 496 (9th Cir. 1991) (alteration and citation omitted). In this case, Tammi executed a consent form, reinforcing the conclusion that she voluntarily consented.

In sum, the totality of the circumstances in this case leads us to conclude that the district court's finding that Tammi voluntarily consented to the search was not clearly erroneous. We therefore affirm the district court's denial of Rodriquez's motion to suppress.

B. There Was Sufficient Evidence to Support the Jury's Finding that Rodriquez Possessed the Firearm

"When reviewing convictions for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Sanders*, 421 F.3d 1044, 1049 (9th Cir. 2005) (emphasis in the original) (citation and internal quotation marks omitted).

The evidence in the record reflects that Packer asked Rodriquez whether Rodriquez could "get rid" of

the gun for him. Rodriquez responded that he could. Packer brought the gun to Rodriquez, who looked at the gun and handled it. After telling Packer that he would try to sell it, Rodriquez kept the gun. Zachary later observed Rodriquez in the apartment with the gun on a table. When Zachary asked about the gun, Rodriquez stated that "he was getting rid of it."

The evidence also supports a reasonable inference that Rodriquez resided in the apartment in which the gun was discovered: officers observed Rodriquez standing outside an open door to the apartment eating a bowl of cereal; although he denied residing in the apartment, two people independently confirmed that he resided there; he had a key to the apartment; he had access to the entire apartment; he had belongings in the apartment; and officers found mail sent to Rodriquez at the apartment's address.[1]

We conclude that the evidence at trial, viewed in the light most favorable to the prosecution, could lead a rational trier of fact to find beyond a reasonable doubt that Rodriquez possessed the firearm. See *United States v. Garcia-Cruz*, 978 F.2d 537, 542 (9th Cir. 1992) (holding that the defendant's sole admission that he had

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[1] The fact that the gun was located under the couch "where numerous individuals had access and control" does not establish that Rodriquez did not have possession of it; the evidence still reasonably supports the inference that he did. Rodriquez provided an implausible explanation for how he arrived at the apartment, denied living in the apartment, and stated that "he didn't have any belongings in apartment # 36," all of which could lead a rational trier of fact to conclude beyond a reasonable doubt that he was attempting to distance himself from the apartment because he was aware that he had put the gun under the couch.

"the gun dropped off to [him] to pick up" was sufficient evidence of possession).

C. Corona-Sanchez Forecloses Use of Rodriquez's Prior Drug Convictions as Predicate Offenses Under the ACCA

We review *de novo* whether a prior conviction "may be used for purposes of enhancement under the ACCA . . ." *United States* v. *Phillips*, 149 F.3d 1026, 1031 (9th Cir. 1998).

Under the ACCA, a person who violates 18 U.S.C. § 922(g) and has three prior convictions for a "violent felony" or a "serious drug offense" is subject to a mandatory minimum sentence of fifteen years. 18 U.S.C. § 924(e)(1). One definition of a serious drug offense is "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which *a maximum term of imprisonment of ten years or more* is prescribed by law . . ." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

Rodriquez was previously convicted of three drug offenses in violation of Washington Revised Code § 69.50.401, the maximum penalty for which is five years' imprisonment. Wash. Rev. Code § 9A.20.021(1)(c). However, if a person is convicted of "a second or subsequent offense," the maximum penalty is ten years. Wash. Rev. Code § 69.50.408(1). The question, then, is whether the district court should consider the maximum penalty as provided in the five-year statute of conviction (which would *not* trigger the ACCA enhancement), or consider the maximum ten-year penalty resulting from the recidivism provision (which *would* trigger the ACCA enhancement). The district court correctly applied our

decision in *Corona-Sanchez,* concluding that it could consider only the five-year maximum penalty provided in the statute of conviction.

In *Corona-Sanchez,* we considered a similar issue: whether a defendant's prior conviction for petty theft under California Penal Code § 484(a) qualified as an "aggravated felony." 291 F.3d at 1208. To qualify as an aggravated felony, the term of imprisonment for the theft offense had to be at least one year. *Id.* On the face of California Penal Code § 484(a), the maximum possible sentence was six months. *Id.* However, the defendant "actually received a two year sentence . . . due to the application of California Penal Code § 666, which provides a sentence enhancement for recidivists." *Id.*

In deciding *Corona-Sanchez,* we followed the "familiar analytical model constructed by the Supreme Court in *Taylor v. United States,* 495 U.S. 575, [600] [, 110 S. Ct. 2143, 109 L. Ed. 2d 607] (1990)." *Id.* at 1203. For federal sentencing enhancement purposes, when we consider the prison term imposed for a prior offense, "we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements."[2] *Id.* at 1209 (reiterating that the court

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[2] In general, federal courts apply this categorical approach to decide whether a defendant's prior conviction qualifies as a particular type of predicate offense (e.g., an "aggravated felony" or a "serious drug offense"), which, in turn, determines whether the defendant will receive an enhanced sentence. To decide whether a prior conviction counts as a particular type of predicate offense under the categorical approach, "federal courts do not examine the facts underlying the prior offense, *but look only to the fact of conviction and the statutory definition of the prior offense.*" *Corona-Sanchez,* 291 F.3d at 1203 (emphasis added) (citation and internal quotation marks omitted). In *Corona-Sanchez,* we

must examine the crime itself, "rather than any sentencing enhancements"); *see also United States v. Moreno-Hernandez*, 419 F.3d 906, 910 (9th Cir. 2005) (stating that, in *Corona-Sanchez*, the court held that "the substantive offense is to be considered independently of any recidivist sentencing enhancement."), *cert. denied*, — U.S. —, 126 S. Ct. 636, 163 L. Ed. 2d 515 (2005). We observed that this conclusion "is consistent with the Supreme Court's historic separation of recidivism and substantive crimes. As the Court bluntly put it, 'recidivism does not relate to the commission of the offense.'" *Corona-Sanchez*, 291 F.3d at 1209 (citations omitted).

The rationale articulated in *Corona-Sanchez* applies equally in this case,[3] dictating the conclusion that the district court could consider only the maximum penalty as provided in the five-year statute of conviction, and not the maximum ten-year penalty resulting from the recidivism provision.

The government attempts to distinguish *Corona-Sanchez* on several bases, none of which are persuasive. The government first posits that, unlike *Corona-Sanchez*, where the petty theft statute (Cal. Penal Code § 484) and the recidivism provision (Cal. Penal Code § 666) were "wholly separate," the statutes in this case "are both in the same article . . . and are codified in fairly close proximity . . ." However, this distinction is not convincing because, in *Corona-Sanchez*, we con-

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concluded that the categorical approach required us to "separate the recidivist enhancement from the underlying offense" and "consider the sentence available for the crime itself . . ." *Id.* at 1209-10.

[3] "We apply the categorical approach in a variety of sentencing contexts." *United States v. Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006) (citation and internal quotation marks omitted).

cluded that "we must separate the recidivist enhancement from the underlying offense." *Corona-Sanchez*, 291 F.3d at 1210. We "must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209. We observed that our conclusion is consistent with, and based on, the Supreme Court's historic separation of substantive crimes and recidivism, pertinent legislative history, and our own cases distinguishing between substantive offenses and recidivist sentencing enhancement statutes. *Id.* This rationale applies regardless of where the recidivist provision is located in the statutory framework. *Cf. United States v. Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002) (relying on *Corona-Sanchez* to disregard a sentencing enhancement located in the same section as the substantive offense).[4]

The government next argues that, in *Corona-Sanchez*, the issue was whether the defendant's prior conviction was for a "theft offense . . . for which the term of imprisonment is at least one year." *Corona-Sanchez*, 291 F.3d at 1204 (alteration, citation, and footnote reference omitted). The "theft offense" language, the government continues, suggests that Congress sought to include "only the punishment imposed for the theft offense itself." In contrast, according to the government, the issue in this case is whether Rodriquez's prior drug convictions were for "an offense . . . *involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . ." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). The govern-

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[4] The government concedes that "the logic of *Corona-Sanchez* does not appear to be confined to separately codified sentencing schemes . . ."

ment contends that the language defining drug offenses is "more expansive and encompasses recidivist offenses . . ."

The government's reliance on the "theft offense" characterization is misplaced, however, because *Corona-Sanchez* did not rely on or attach any particular significance to that term. Rather, *Corona-Sanchez* focused on *the term of imprisonment for the theft offense* in determining whether a conviction for theft qualified as an aggravated felony. *See* 291 F.3d at 1208.

By urging us to conclude that the term "involving" is so broad as to "encompass[ ] recidivist offenses," the government is, in effect, contending that the drug offenses should be interpreted as subsuming corollary recidivism enhancements. That interpretation would effectively render "offense" and "sentencing enhancements" coterminous, a result that is foreclosed by Supreme Court precedent. *See Apprendi v. New Jersey*, 530 U.S. 466, 488, 496, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) ("[R]ecidivism does not relate to the commission of the offense.") (internal quotation marks omitted); *see also Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) ("[S]entence enhancements . . . do not describe substantive criminal offenses . . .") (internal quotation marks omitted) (citing *Corona-Sanchez*, 291 F.3d at 1211); *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (per curiam) (holding that California Vehicle Code § 23175 [now § 23550, which provides an enhanced penalty for successive convictions for driving under the influence of alcohol,] "is an enhancement statute; it does not alter the elements of the underlying offense.") (citation omitted).

Finally, the government postulates that *Corona-Sanchez* applies only where the underlying offense is a misdemeanor and applying the recidivism provision would transform the misdemeanor into a felony. Because Rodriquez's prior drug offenses are already felonies, the government maintains, *Corona-Sanchez* does not apply, and the district court should have considered the maximum penalty applying the recidivism provision.

We disagree. *Corona-Sanchez* applies irrespective of the nature of the underlying crime of which a defendant is convicted. In *Corona-Sanchez*, we held that "a crime may be classified as an 'aggravated felony' . . . without regard to whether, under state law, the crime is *labeled* a felony or a misdemeanor." 291 F.3d at 1210 (emphasis in the original). In so holding, we agreed with our sister circuits that "it is irrelevant whether the state labels the underlying crime 'misdemeanor' or 'felony'. . . . The relevant question is whether the crime meets the definition of an 'aggravated felony' under federal sentencing law." *Id.* (citation and footnote reference omitted).

Likewise, Rodriquez's three convictions for delivery of a controlled substance may be classified as "serious drug offenses" "without regard to whether, under state law, the crime is *labeled* a felony or a misdemeanor." *Id.* As articulated in *Corona-Sanchez*, "it is irrelevant" whether Rodriquez's underlying crimes are misdemeanors or felonies; the relevant question is whether his prior drug offenses meet the definition of a "serious drug offense." *Id.* Under *Corona-Sanchez*, whether application of a recidivism enhancement would transform a misdemeanor into a felony is simply of no import.

However the government frames its argument, the essence of its request is that we consider the offense and the sentencing enhancement together. But that is precisely what is forbidden by *Corona-Sanchez* and its progeny. *See Moreno-Hernandez*, 419 F.3d at 911 ("*Corona-Sanchez* explained the cleaving of the recidivist enhancement from the underlying offense largely on the basis that the enhancement was measured by recidivism. Following the Supreme Court's reiteration . . . that 'recidivism does not relate to the commission of the offense,' the en banc court regarded petty theft as a single, substantive offense, as to which various sentencing alternatives were available depending on the defendant's past criminal history.") (citations and emphasis omitted).

In sum, the government's distinctions cannot overcome the language in, or the rationale of, *Corona-Sanchez*. Based on *Corona-Sanchez*, the district court properly concluded that it could consider only the five-year maximum penalty provided in the statute of conviction. Because Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA, the district court correctly declined to apply that enhancement.[5]

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[5] We recognize that this conclusion is in conflict with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-70 (7th Cir. 2004), *cert. denied*, 543 U.S. 967, 125 S. Ct. 431, 160 L. Ed. 2d 336 (2004), and in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (5th Cir. 2006) (per curiam), and the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (4th Cir. 2003). Nevertheless, *Corona-Sanchez* is binding Ninth Circuit precedent and dictates the conclusion we reach.

III

CONCLUSION

Because Tammi Putnam voluntarily consented to the search of apartment 36, the motion to suppress the firearm was properly denied. There was sufficient evidence presented during trial to enable a rational jury to conclude beyond a reasonable doubt that Rodriquez possessed the firearm. *Corona-Sanchez* applies in this ACCA case, dictating the conclusion that Rodriquez's prior drug convictions do not qualify as predicate offenses under the ACCA.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-30397
D.C. No. CR-03-00142-RHW
Eastern District of Washington, Spokane

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLANT

No. 04-30494
D.C. No. CR-03-00142-RHW
Eastern District of Washington, Spokane

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GINO GONZAGA RODRIQUEZ, DEFENDANT-APPELLEE

[Filed: Jan. 12, 2007]

ORDER

Before: RAWLINSON and CLIFTON, Circuit Judges, and MARSHALL,* Chief District Judge.

The panel has voted to deny the petition for rehearing en banc.

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* The Honorable Consuelo Marshall, Senior United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote.

The petition for rehearing en banc filed on November 20, 2006, is DENIED.

STATUTORY PROVISIONS

1. Section 9A.20.021(1)(c) of the Revised Code of Washington Annotated (West 1994) provides:

Maximum sentences for crimes committed July 1, 1984, and after

(1) Felony. No person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

* * * * *

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

* * * * *

2. Section 69.50.101(r)(1) of the Revised Code of Washington Annotated (West 1994) provides:

Definitions

Unless the context clearly requires otherwise, definitions of terms shall be indicated where used in this chapter:

(r) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium, opium derivative, and any derivative of opium or opium derivative, including their salts, isomers, and salts of isomers, whenever the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation. The term does not include the isoquinoline alkaloids of opium.

* * * * *

3. Section 69.50.204 of the Revised Code of Washington Annotated (West 1994) provides:

Schedule I

Unless specifically excepted by state or federal law or regulation or more specifically included in another schedule, the following controlled substances are listed in Schedule I:

(a) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide);

(2) Acetylmethadol;

(3) Allylprodine;

(4) Alphacetylmethadol;

(5) Alphameprodine;

(6) Alphamethadol;

(7) Alpha-methylfentanyl (N-[1-(alpha-methyl-beta-phenyl) ethyl-4-piperidyl] propionanilide); (1-(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine);

(8) Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl) ethyl-4-piperidinyl]-N-phenylpropanamide);

(9) Benzethidine;

(10) Betacetylmethadol;

(11) Beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide);

(12) Beta-hydroxy-3-methylfentanyl some trade or other names: N-[1-(2-hydrox-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide;

(13) Betameprodine;

(14) Betamethadol;

(15) Betaprodine;

(16) Clonitazene;

(17) Dextromoramide;

(18) Diampromide;

(19) Diethylthiambutene;

(20) Difenoxin;

(21) Dimenoxadol;

(22) Dimepheptanol;

(23) Dimethylthiambutene;

(24) Dioxaphetyl butyrate;

(25) Dipipanone;

(26) Ethylmethylthiambutene;

(27) Etonitazene;

(28) Etoxeridine;

(29) Furethidine;

(30) Hydroxypethidine;

(31) Ketobemidone;

(32) Levomoramide;

(33) Levophenacylmorphan;

(34) 3-Methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide);

(35) 3-methylthiofentanyl (N-[(3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide;

(36) Morpheridine;

(37) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

(38) Noracymethadol;

(39) Norlevorphanol;

(40) Normethadone;

(41) Norpipanone;

(42) Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl] propanamide);

(43) PEPAP(1-(-2-phenethyl)-4-phenyl-4-acetoxypiperidine);

(44) Phenadoxone;

(45) Phenampromide;

(46) Phenomorphan;

(47) Phenoperidine;

(48) Piritramide;

(49) Proheptazine;

(50) Properidine;

(51) Propiram;

(52) Racemoramide;

(53) Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanaminde);

(54) Tilidine;

(55) Trimeperidine.

(b) Opium derivatives. Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, including their salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;

(2) Acetyldihydrocodeine;

(3) Benzylmorphine;

(4) Codeine methylbromide;

(5) Codeine-N-Oxide;

(6) Cyprenorphine;

(7) Desormorphine;

(8) 3,4-methylenedioxy-N-ethylamphetamine some trade or other names: N-ethyl-alpha-methyl-3,4(methylenedioxy)phenthylamine, N-ethyl MDA, MDE, MDEA;

(9) N-hydroxy-3,4-methylenedioxyamphetamine some trade or other names: N-hydroxy-alpha-methyl-

3,4(methylenedioxy)phenethylamine, and N-hydroxy MDA;

(10) Dihydromorphine;

(11) Drotebanol;

(12) Etorphine, except hydrochloride salt;

(13) Heroin;

(14) Hydromorphinol;

(15) Methyldesorphine;

(16) Methyldihydromorphine;

(17) Morphine methylbromide;

(18) Morphine methylsulfonate;

(19) Morphine-N-Oxide;

(20) Myrophine;

(21) Nicocodeine;

(22) Nicomorphine;

(23) Normorphine;

(24) Pholcodine;

(25) Thebacon.

(c) Hallucinogenic substances. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers whenever the existence of those salts, isomers, and salts of isomers is possible within the specific chemical designation.

(1) 4-bromo-2,5-dimethoxy-amphetamine: Some trade or other names: 4-bromo-2,5-dimethoxy-a-methylphenethylamine; 4-bromo-2,5-DMA;

(2) 2,5-dimethoxyamphetamine: Some trade or other names: 2,5-dimethoxy-a-methylphenethylamine; 2,5-DMA;

(3) 4-methoxyamphetamine: Some trade or other names: 4-methoxy-a-methylphenethylamine; paramethoxyamphetamine, PMA;

(4) 5-methoxy-3,4-methylenedioxy-amphetamine;

(5) 4-methyl-2,5-dimethoxy-amphetamine: Some trade and other names: 4- methyl-2,5-dimethoxy-a-methylphenethylamine; "DOM"; and "STP";

(6) 3,4-methylenedioxy amphetamine;

(7) 3,4-methylenedioxymethamphetamine (MDMA);

(8) 3,4,5-trimethoxy amphetamine;

(9) Bufotenine: Some trade or other names: 3-(beta-Dimethylaminoethyl)-5- hydroxindole; 3-(2-dimethylaminoethyl)-5-indolol; N, N-dimethylserotonin; 5- hydroxy-N,N-dimethyltryptamine; mappine;

(10) Diethyltryptamine: Some trade or other names: N,N-Diethyltryptamine; DET;

(11) Dimethyltryptamine: Some trade or other names: DMT;

(12) Ibogaine: Some trade or other names: 7-Ethyl-6,6 beta,7,8,9,10,12,13,- octahydro-2-methoxy-6,9-methano-5H-pyndo (1',2' 1,2) azepino (5,4-b) indole; Tabernanthe iboga;

(13) Lysergic acid diethylamide;

(14) Marihuana or marijuana;

(15) Mescaline;

(16) Parahexyl-7374: Some trade or other names: 3-Hexyl-1-hydroxy-7,8,9,10- tetrahydro-6,6,9-trimethyl-6H-dibenzo[b,d]pyran; synhexyl;

(17) Peyote, meaning all parts of the plant presently classified botanically as Lophophora Williamsii Lemaire, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds, or extracts; (interprets 21 U.S.C. Sec. 812(c), Schedule I(c)(12));

(18) N-ethyl-3-piperidyl benzilate;

(19) N-methyl-3-piperidyl benzilate;

(20) Psilocybin;

(21) Psilocyn;

(22) Tetrahydrocannabinols, synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, species, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

(i) Delta 1 - cis - or trans tetrahydrocannabinol, and their optical isomers, excluding tetrahydrocannabinol in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the United States Food and Drug Administration;

(ii) Delta 6 - cis - or trans tetrahydrocannabinol, and their optical isomers;

(iii) Delta 3,4 - cis - or trans tetrahydrocannabinol, and its optical isomers;

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

(23) Ethylamine analog of phencyclidine: Some trade or other names: N-ethyl-1phenylcyclohexalymine, (1-phenylcyclohexl) ethylamine; N-(1-phenylcyclohexyl)ethylamine; cyclohexamine; PCE;

(24) Pyrrolidine analog of phencyclidine: Some trade or other names: 1-(1- phencyclohexyl)pyrrolidine; PCPy; PHP;

(25) Thiophene analog of phencyclidine: Some trade or other names: 1-(1-[2- thenyl]-cyclohexly)-pipendine; 2-thienylanalog of phencyclidine; TPCP; TCP;

(26) 1-[1-(2-thienyl)cyclohexyl]pyrrolidine: A trade or other name is TCPy.

(d) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

(1) Mecloqualone.

(2) Methaqualone.

(e) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, com-

pound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

(1) Fenethylline;

(2) (+-)cis-4-methylaminorex ((+-)cis-4,5-dihydro-4-methyl-5-phenyl-2- oxazolamine);

(3) N-ethylamphetamine;

(4) N,N-dimethylamphetamine: some trade or other names: N,N-alpha-trimethyl-benzeneethanamine; N,N-alpha-trimethylphenoethylene.

The controlled substances in this section may be rescheduled or deleted as provided for in RCW 69.50.201.

* * * * *

4. Section 69.50.401 of the Revised Code of Washington Annotated (West 1994) provides:

Prohibited acts: A—Penalties

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this section with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilo-

grams of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars, for each gram in excess of two kilograms, or both such imprisonment and fine;

(ii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iii) a substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(b) Except as authorized by this chapter, it is unlawful for any person to create, deliver, or possess a counterfeit substance.

(1) Any person who violates this subsection with respect to:

(i) a counterfeit substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both;

(ii) any other counterfeit substance classified in Schedule, I, II, or III, is guilty of a crime and upon con-

viction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iii) a counterfeit substance classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a counterfeit substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(c) It is unlawful, except as authorized in this chapter and chapter 69.41 RCW, for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other liquid, substance or material in lieu of such controlled substance. Any person who violates this subsection is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

(d) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a crime, and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both, except as provided for in subsection (e) of this section.

(e) Except as provided for in subsection (a)(1)(ii) of this section any person found guilty of possession of forty grams or less of marihuana shall be guilty of a misdemeanor.

(f) It is unlawful to compensate, threaten, solicit, or in any other manner involve a person under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance. A violation of this subsection shall be punished as a class C felony punishable in accordance with RCW 9A.20.021.

5. Section 69.50.408 of the Revised Code of Washington Annotated (West 1994) provides:

Second or subsequent offenses

(a) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(c) This section does not apply to offenses under RCW 69.50.401(d).

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No. 06-1646

FILED
DEC 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GINO GONZAGA RODRIQUEZ

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e), establishes a mandatory minimum sentence for a felon convicted of possession of a firearm if the defendant has three prior convictions for "serious drug offenses" or "violent felonies." A "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii). The question presented is:

Whether a court determining if a state conviction qualifies as a "serious drug offense" should look only to the maximum term of imprisonment prescribed by statute for commission of the offense, or must consider, in addition, particular facts of the defendant's case that could lead to an enhanced sentence under a broadly applicable state recidivist statute.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 255-71) is reported at 464 F.3d 1072. The sentencing order of the district court (J.A. 245-54) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. A petition for rehearing was denied on January 12, 2007 (J.A. 272-73). On March 29, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 12, 2007. On May 2, 2007, Justice Kennedy further extended the time to and including June 11, 2007. The petition was filed on that date and granted on September 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (2000 & Supp. IV 2004), is reprinted in an appendix to the brief of the United States at App. 1a-2a.

STATEMENT

1. Under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), a felon found guilty of possession of a firearm is subject to a mandatory minimum sentence of fifteen years if he or she has three previous convictions for a "violent felony" or a "serious drug offense." Section 924(e)(2)(A)(ii) defines a "serious drug offense," in part, as "an offense under state law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law."

When the ACCA was originally enacted in 1984, robbery and burglary were the only predicate offenses under the statute. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185. In 1986, Congress expanded the predicate offenses triggering the ACCA by replacing burglary and robbery with three broad categories of crime: violent felonies involving the use, attempted use, or threatened use of physical force; crimes involving a serious risk of physical injury to another; and serious drug crimes. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Subtitle I, § 1402, 100 Stat. 3207. As the 1986 amendment was drafted, "a consensus developed" supporting the addition of the violent felonies category and violations of "State and Federal laws for which a maximum term of imprisonment of 10 years or more is prescribed for manufacturing, distributing or possessing with intent to manufacture or distribute controlled substances." H.R. Rep. No. 99-849, at 3 (1986). Debate over which property crimes to include produced the language in section 924(e)(2)(B)(ii), which encompasses certain enumerated crimes as well as "conduct that presents a serious potential risk of physical injury to another." That language reflects Congress's intention to cover "fairly serious crimes" that present a "potential threat of harm to persons." *Taylor* v. *United States*, 495 U.S. 575, 587 (1990).

2. In April 2003, law enforcement officials in Spokane County, Washington, arrested respondent Gino Gonzaga Rodriquez outside the apartment in which he was living for failure to satisfy the requirements of his community supervision. J.A. 256. After obtaining the consent of a co-occupant, authorities searched the apartment and found a gun. J.A. 258. Respondent had agreed to dispose of the gun,

which had belonged to a friend of the co-occupant's teenaged son. J.A. 256-57.

A jury subsequently convicted respondent of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). At sentencing, the government sought to apply the ACCA sentencing enhancement, 18 U.S.C. § 924(e), thereby subjecting respondent to a mandatory minimum sentence of fifteen years in prison. J.A. 245-46. The government invoked this sentencing enhancement, in part, on the basis of respondent's prior convictions under Washington law for delivery of a controlled substance. J.A. 250.[1]

The convictions at issue occurred simultaneously on November 16, 1995, when respondent pleaded guilty to three offenses involving the delivery of Schedule III, IV and V controlled substances. *Ibid.* Under Wash. Rev. Code § 69.50.401(a)(1) (1994) (J.A. 283-84), "any person [who] manufacture[s], deliver[s], or possess[es] with intent to manufacture or deliver" such substances is subject to a maximum sentence of five years' imprisonment. In 1995, the relevant state sentencing guidelines – which were mandatory and set an upper limit on respondent's sentence – provided that respondent's permissible sentencing range for each of these offenses was 43-57 months. See Wash. Rev. Code § 9.94A.310 (1994). See also J.A. 16, 42, 93.[2] Respondent was sentenced

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[1] Respondent does not contest that two California burglary convictions in 1980 and 1982 qualify as ACCA predicate offenses.

[2] The Washington guidelines contain a grid with offense "seriousness level" on one axis and "offender score" on the other. See Wash. Rev. Code § 9.94A.310 (1994). Based on respondent's offense of conviction, an offense "seriousness level" of four applied. His criminal history resulted in an "offender score" of seven. J.A. 16. The resulting sentencing range accord-

to forty-eight months' imprisonment on each conviction, with the sentences to run concurrently. J.A. at 21, 47, 98.

Washington law also contained a separate provision, Wash. Rev. Code § 69.50.408(a) (1994), that permitted state courts to impose enhanced sentences for individuals convicted of "a second or subsequent" controlled substance offense. J.A. 286. Courts in Washington are divided on whether a sentencing judge has discretion to decline to apply the enhancement. Compare *State* v. *O'Neal*, 109 P.3d 429, 446 (Wash. App. Div. 2, 2005) (enhancement is discretionary); *State* v. *Mayer*, 86 P.3d 217, 221 (Wash. App. Div. 3, 2004) (same), with *In re Hopkins*, 948 P.2d 394, 397 (Wash. App. Div. 1, 1997), rev'd, 976 P.2d 616 (1999) (appellate court held that enhancement was required, but state supreme court reversed prior to reaching the question).[3] If a judge does apply the enhancement, a defendant with a qualifying predicate conviction is subject to a maximum prison term of twice that otherwise authorized. J.A. 286.

Documents titled "Statement of Defendant on Plea of Guilty to a Felony," which were signed by respondent, stated that the standard sentencing range

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ing to the grid was 43-57 months' imprisonment. See Wash. Rev. Code § 9.94A.310 (1994). This "standard sentence range" was mandatory and respondent could not receive a higher sentence absent the finding of aggravating circumstances. *Id.* § 9.94A.120(1)-(2) (providing that unless exceptional circumstances were found, "the court shall impose a sentence within the sentence range for the offense."). See also *Blakely* v. *Washington*, 542 U.S. 296, 299-300 (2004) (describing Washington sentencing regime).

[3] The conviction at issue here occurred in Spokane County, (J.A. 13), which is in Division Three. Accordingly, courts have discretion in this district to apply the recidivist enhancement. See Wash. R. App. P. 4.1(b)(3).

was 43-57 months' imprisonment. J.A. 28, 54, 105. Two of the statements make reference only to the standard sentencing range (J.A. 54, 105) while one statement also notes that respondent's maximum sentence was ten years (J.A. 28). The judgment and sentence corresponding to these statements likewise listed the presumptive sentencing range as 43-57 months and the maximum possible sentence as ten years. J.A. 16, 42, 93. No prior conviction for a controlled substance offense is noted.

3. Based on this record, the government argued before the district court that respondent's 1995 convictions qualified as "serious drug offenses" under 18 U.S.C. § 924(e). The government contended that the Washington recidivist sentencing enhancement, Wash. Rev. Code § 69.50.408, "automatically applied" to respondent's convictions, doubling the five-year maximum term of imprisonment prescribed by the offense and producing a maximum possible term of imprisonment of ten years. J.A. 197.

The district court rejected the government's position, holding that "the application of the separate sentencing statute does not alter the maximum sentence available for the crime itself." J.A. 252. Relying on this Court's decision in *Taylor*, the district court ruled that "[i]n determining whether a particular offense qualifies as a predicate offense for the [ACCA] enhancement, the court engages in a categorical analysis, in that the court does not examine the facts underlying the prior offense, but 'looks only to the statutory definitions of the prior offenses.'" J.A. 246 (quoting *Taylor*, 495 U.S. at 600). Observing that "[t]he Government's labeling of the [recidivist] statute as non-discretionary and not a sentencing enhancement does not affect the analysis" (J.A. 254), the court recognized that the statute invoked

by the government was meant to address recidivism and "[a]s the Supreme Court clearly stated, 'recidivism does not relate to the commission of the offense'" (J.A. 253 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 488 (2000))).

The court therefore found that "on its face," Washington's "statutory definition of [respondent's] prior drug offenses do[es] not meet the criteria for a predicate offense for purposes of the armed career criminal enhancement" because it prescribes a maximum prison term of only five years. J.A. 253. As the court found only two qualifying predicate offenses, it ruled that the ACCA did not apply in this case. J.A. 254.

4. The court of appeals unanimously affirmed. J.A. 255-71. Invoking "the 'familiar analytical model constructed by the Supreme Court in *Taylor*,'" the court held that, "[f]or federal sentencing enhancement purposes, when we consider the prison term imposed for a prior offense, 'we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.'" J.A. 265 (quoting *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1203, 1209 (9th Cir. 2002)). The court observed that "the essence of [the government's argument] is that we consider the offense and the sentencing enhancement together" (J.A. 270), and rejected that contention based on "the Supreme Court's historic separation of substantive crimes and recidivism, pertinent legislative history, and our own cases distinguishing between substantive offenses and recidivist sentencing enhancement statutes" (J.A. 267).

The court of appeals denied the government's petition for rehearing en banc, with no judge requesting a vote. J.A. 272-73.

SUMMARY OF ARGUMENT

The parties approach the ACCA from fundamentally different perspectives. Respondent views the statute as focusing on the seriousness of the "offense" committed by the defendant, with seriousness measured by the maximum penalty the state legislature attached to the commission of that crime. The government, in contrast, views application of the ACCA as turning on the particular characteristics of the *offender* rather than of the *offense*, so that the same crime will be regarded as "serious" for ACCA purposes when committed by some defendants and as non-serious when committed by others.

Respondent has the better of this argument. The plain language and clear policy of the ACCA – which asks whether the defendant's "offense" is one "for which a maximum term of imprisonment of ten years or more is prescribed by law" – means that a court should look to the penalty assigned by the legislature to a conviction for engaging in conduct constituting the elements of the offense. Under this statutory formula, the defendant's status as a recidivist has no connection at all to whether the offense committed by the defendant was a "serious" one. That conclusion is supported by the congressional intent, recognized repeatedly in this Court's decisions applying the ACCA, which requires a "categorical" treatment of offenses under the statute. And it is confirmed by the recognition that Congress is perfectly capable of referring to "categories of offenders" when that is what it means – as it has done in *other* statutes but did not do in the ACCA.

The government's reading suffers from more than inconsistency with the ACCA's language and policy. The government insists that the possibility of a recidivist enhancement is relevant because the ACCA is triggered when the defendant "actually faced" a ten-year sentence. But this approach is unworkable, requiring federal courts to determine what sentence the defendant "actually faced" by engaging in difficult inquiries regarding novel questions of state law and complex factual determinations regarding long-forgotten proceedings in state court. It also suffers from a fatal flaw of logic. The government asks whether the defendant "actually faced" a ten-year sentence. U.S. Br. 14. But under mandatory state sentencing guidelines, which are just as much a component of state law as the recidivist provision invoked by the government, respondent "actually faced" a sentence well *below* the ten-year ACCA trigger. If the government's approach is correct, respondent accordingly may not be subject to an enhanced ACCA sentence. In this light, the government's insistence that recidivist enhancements count under the ACCA – but that binding caps from state sentencing guidelines do not – demonstrates the fundamental incoherence of its approach.

ARGUMENT

I. CONGRESS DID NOT INTEND THAT RECIDIVISM ENHANCEMENTS BE TAKEN INTO ACCOUNT IN DETERMINING THE "MAXIMUM TERM OF IMPRISONMENT * * * PRESCRIBED BY LAW" FOR A "SERIOUS DRUG OFFENSE" UNDER THE ACCA.

The government's approach is entirely divorced from the language and manifest purpose of the

ACCA. There is no doubt about the goal of the statute: it was designed to impose mandatory penalties on persons who engaged repeatedly in "a large number of *fairly serious crimes* as their means of livelihood." *Taylor*, 495 U.S. at 587 (emphasis added). In providing for these penalties, Congress expressly had in mind persons who committed offenses that were particularly dangerous or destructive of societal values – in the statute's terms, those that are a "violent felony" or a "serious" drug offense. Congress thus sought "to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof." *Id.* at 590.

To qualify as a trigger for the ACCA's enhanced penalty, the defendant's prior convictions accordingly must be for engaging in *conduct* of the sort that Congress regarded as "violent" or "serious." In the context of state drug offenses, Congress used the maximum penalty specified for the offense by state law as a short-hand means of identifying conduct deemed sufficiently "serious" to trigger the ACCA's mandatory penalty. Thus, "serious drug offense" is defined, in relevant part, as "an offense * * * for which a maximum term of imprisonment of ten years or more is prescribed by law" (18 U.S.C. § 924(e)(2)(A)(ii)); the congressional premise was that an offense punishable by such a lengthy term of imprisonment involved conduct sufficiently serious to warrant treating it as a trigger for the ACCA's mandatory minimum.[4] Under this regime, the focus is on the acts

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[4] The ten year or greater sentence definition for "serious drug offenses" was suggested by the Department of Justice to ensure that the ACCA targeted prior convictions for "drug importation or exportation." *The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. 10 (1986) (statement

constituting the offense of conviction and the penalty prescribed for commission of that offense. A sentencing enhancement for recidivism, which says nothing about whether that offense was "serious" or the defendant's conduct especially dangerous, plays no part in this equation.

1. When determining whether a maximum term of ten years is "prescribed by law" for an "offense," courts should look to the penalty associated by the legislature with conviction *for committing the acts constituting the particular offense* charged to the defendant. That approach is dictated by the ACCA's plain language, which associates the triggering ten-year prison term with an "offense" – a word that generally is understood to describe the elements constituting the crime. See *Black's Law Dictionary* 1110 (8th ed. 2004) (defining "offense" as "a violation of the law; a crime"). As a consequence, if the statute defining the offense for which the ACCA defendant previously was convicted provides for a maximum prison term of less than ten years, the legislature did not regard the conduct as "serious" enough to trigger

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of James I. K. Knapp, Deputy Assistant Attorney General) [hereinafter *ACCA Amendment Hearing*]. In 1986, when Congress enacted the "serious drug offense" prong of ACCA, many states treated offenses involving distribution of, manufacture of, and possession with intent to manufacture or distribute "narcotic" drugs – opium, heroin, cocaine, and the like – as "serious" enough to warrant a maximum prison sentence of ten years or more. See, *e.g.*, Cal. Health & Safety Code §§ 11351.5, 11370.4; Fla. Stat. §§ 775.082(3)(c), 893.13(1)(a)(1); Mich. Comp. Laws § 333.7401(2)(a); N.Y. Penal Law §§ 70.00, 220.16; Tex. Rev. Civ. Stat. art. 4476-15, §§ 4.01(b)(1), .03. These very same states, however, treated identical conduct regarding less "serious" substances as less serious, punishable by a prison term of less than ten years. See, *e.g.*, Cal. Health & Safety Code §§ 11378.5; Fla. Stat. §§ 775.082(4), 893.13(1)(a)(3); Mich. Comp. Laws § 333.7401(2)(d); N.Y. Penal Law §§ 70.00, 220.31; Tex. Rev. Civ. Stat. art. 4476-15, §§ 4.01(a)(1), .044.

the ACCA's mandatory penalty. As then-Chief Judge Breyer put it for the First Circuit in similar circumstances, to make this determination the court "simply look[s] to the crime as the statute defined it." *United States* v. *Doe*, 960 F.2d 221, 224 (1st Cir. 1992).

There is no place for factoring a recidivist enhancement into this scheme. As the United States concedes (U.S. Br. 15), recidivism typically is not an element of the offense and was not in fact an element of the Washington offense for which respondent was convicted. See generally *Almendarez-Torres* v. *United States*, 523 U.S. 224, 244 (1998) (observing the "longstanding tradition" that "recidivism 'does not relate to the commission of the offense, *but goes to the punishment only*'" (emphasis in original) (quoting *Graham* v. *West Virginia*, 224 U.S. 616, 624 (1912))). And the defendant's status as a recidivist has no connection to whether the offense committed by the defendant was a "serious" one.

Arguing to the contrary, the government suggests that an offense "might have been deemed more serious" (by a state legislature or by Congress) if committed by a repeat offender. U.S. Br. 17. But that is a very odd use of language. One might say that such an offender is deserving of harsher punishment; that is, of course, the basis for enhancing the sentences of recidivists. But in ordinary usage, that hardly means that the "offense" committed by that defendant is a more "serious" one. The nature of the conduct, the elements of the offense, and the impact of the crime are the same regardless of the criminal history of the defendant – and those are the characteristics that typically are used to gauge the "seriousness" of an offense.

2. This understanding of the ACCA is strongly supported by the Court's decisions mandating a "categorical" approach to the statute. See, *e.g.*, *Taylor*, 495 U.S. at 588; *James* v. *United States*, 127 S. Ct. 1586, 1594 (2007). The categorical approach rests on the congressional intent – reflected in the statutory language – to focus the ACCA inquiry on the offense of conviction, rather than on collateral matters unrelated to the definition of the crime. As the Court put it in *Taylor*, the statutory language "generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories." 495 U.S. at 600. "Congress intended that the enhancement provision be triggered by crimes having certain *specified elements* * * *. [T]he proposed versions of the 1986 amendment carried forward this categorical approach, extending the range of predicate offenses to *all crimes having certain common characteristics* * * * regardless of how they were labeled by state law." *Id.* at 588-89 (emphasis added). See also *id.* at 590 ("Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to *capture all offenses of a certain level of seriousness* * * * regardless of technical definitions and labels under state law.") (emphasis added).

The Court confirmed this understanding earlier this year. In *James*, the Court elaborated on the "categorical approach," explaining that it "'look[s] only to the fact of conviction and the statutory definition of the prior offense,' and do[es] not generally consider the 'particular facts disclosed by the record of conviction.'" 127 S. Ct. at 1593-94 (citations omitted). To determine what counts as a predicate of-

fense, the Court added, courts should "consider whether the *elements of the offense* are of the type that would justify its inclusion * * * without inquiring into the specific conduct of this particular offender." *Ibid.* (emphasis in original). The Court's most recent precedent thus confirms Congress's intent that judicial inquiry into the meaning of the term "offense" should focus on the elements of the underlying state statutory violation. When the ACCA was enacted, "no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." *Taylor*, 495 U.S. at 601. But that is just what the government contends here: that "a particular crime might sometimes count towards enhancement and sometimes not, depending" on who commits it. *Ibid.*

The legislative background also confirms the congressional focus on the nature of the criminal act giving rise to the ACCA defendant's conviction. Congress clearly envisioned a certain character of violent crime when it originally considered the statute. See S. Rep. No. 97-585, at 5-6, 62-63 (1982) (noting Congress designed the ACCA from the outset to punish the crimes of armed burglary and armed robbery because "these two offenses * * * are the most prevalent, frightening, and harmful of all the violent crimes that could be federally prosecuted").[5] And this notion of severity persisted through the Act's amendment. See H.R. Rep. No. 99-849, at 3 (stating

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[5] S. Rep. No. 97-585 addresses an earlier version of the ACCA that did not pass the Senate, S. 1688, 97th Cong. (1982). Congress later passed the measure as S. 52, 98th Cong. (1984), and expressly recognized the two measures as substantively the same. See S. Rep. No. 98-190, at 3 (1983).

that the purpose of the Act was to cover violent felonies, an element of which is the use or attempted or threatened use of physical force against a person and enumerating murder, rape, assault, and robbery as examples).

3. The government, of course, takes a different view. Its case is premised on the proposition that the existence of a state recidivism provision means that the legislature has established "*alternative* maximum terms of imprisonment" for the same offense that apply to different categories of "offenders." U.S. Br. 16 (emphasis in original). The government repeats this formulation of the issue throughout its brief (see, *e.g.*, *id.* at 19-20), including in its statement of the question presented. See *id.* at i (asking "[w]hether a state drug-trafficking offense, for which the maximum term of imprisonment *for repeat offenders* was ten years, qualifies as [an ACCA] predicate offense" (emphasis added)).

That approach might have some force had Congress written a different statute – had it drafted the ACCA to say, for example, that the mandatory fifteen-year sentence is triggered when the defendant is "*an offender* subject to a maximum term of imprisonment of ten years for commission of a drug offense." But the government's approach cannot be squared with the statute that Congress *actually* wrote, which refers to the penalty "prescribed by law" for an "offense" and *not* to the sentence that may be imposed on categories of "offenders." The distinction is fundamental; the first approach (the one Congress actually used) focuses on the crime for which the defendant was convicted, while the second (the one the government prefers) looks to characteristics of defendants that may qualify them for enhanced penalties.

There is, moreover, every reason to believe that Congress's decision to use "offense" rather than "offenders" was made advisedly and intentionally. The point is made clear by *United States* v. *LaBonte*, 520 U.S. 751 (1997), a decision that is featured prominently in the government's brief. See U.S. Br. 17-19. The statute at issue in that case, 28 U.S.C. § 994(h), in fact used the government's preferred formulation, providing that the Sentencing Commission "shall assure that the [sentencing] guidelines specify a sentence to a term of imprisonment at or near the maximum term *authorized for categories of defendants*" who have certain types of prior convictions. In holding that the "maximum term" identified in Section 994(h) for a repeat offender is the one that could be imposed on a "career offender" rather than the one that could be imposed on a first-time offender, the Court specifically relied on the "categories of defendants" language used by Congress, finding it crucial that the statutory scheme "obviously contemplates two distinct categories of repeat offenders for each possible crime." *LaBonte*, 520 U.S. at 759. See also *id.* at 758 ("Congress has expressly provided enhanced maximum penalties for certain categories of repeat offenders * * *.").[6] The ACCA, in

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[6] In addition, the tiered system of the Federal Sentencing Guidelines at issue in *LaBonte* was *designed* to provide base-level punishments for offenders that could be increased if certain enhancement sentencing factors were satisfied. In contrast, nothing in the ACCA suggests that Congress intended that identical predicate offenses be treated differently depending upon the criminal history of the defendant. In fact, the government recognizes this very distinction when it discusses *United States* v. *R.L.C.*, 503 U.S. 291 (1992). The government argues that the Federal Sentencing Guidelines at issue in that case "significantly differed" from the ACCA "because [they] expressly contemplated an offender-specific maximum

notable contrast, makes no reference to "categories of offenders" or "categories of defendants."[7]

This distinction is especially notable because Congress enacted Section 994(h) in 1984, the same year that it initially passed the ACCA and two years before it enacted the ACCA "serious drug offense" language at issue here. The Court should find it significant that Congress, when it enacted a statute that addressed a sentencing issue shortly after passage of Section 994(h), chose to depart from that provision's pre-existing "categories of defendants" formulation and instead focused on penalties for the "offense." "[W]hen Congress uses different words * * * a court [should not] ordinarily equate the two phrases." *Doe* v. *Chao*, 540 U.S. 614, 630 (2004). See also *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1083-84 (2007); *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). Although the government's attempt to make lemonade from the *LaBonte* lemon therefore is commendable,

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sentence" as opposed to one "for the underlying offense." U.S. Br. 34.

[7] The government also strains to find significance in the ACCA's use of the article "a" in referring to "*a* maximum term of imprisonment of ten years" when it defines "serious drug offense." U.S Br. 16-17. This choice of language means, the government suggests, that Congress had in mind multiple "maximum terms of imprisonment" that would vary according to the identity of the defendant; otherwise, the argument continues, Congress would have used the formulation "*the* maximum term of imprisonment." *Ibid.* But this is a very improbable deconstruction of the statutory language. A formulation referring to "an offense under state law * * * for which *the* maximum term of imprisonment of ten years or longer is prescribed by state law" would have been both awkward and arguably ungrammatical. There is no reason at all to believe that, in using the much more natural formulation "a maximum term of imprisonment * * * is prescribed by state law," Congress had in mind the government's "alternative sentences" theory of this case.

its argument draws precisely the wrong conclusion from that decision.[8]

4. Given the government's departure from the statutory language, it comes as no surprise that the government's approach also would distort the legislative purpose, vastly expanding the reach of the ACCA in a manner that Congress could not have anticipated or approved. As we have noted, the ACCA was aimed at defendants who engaged in "a large number of fairly serious crimes * * *." *Taylor*, 495 U.S. at 587. But use of a recidivist enhancement to trigger the ACCA would mean that predicate offenses no longer need be "serious." That is true in this case, where respondent was convicted of distribution of a Schedule III-V controlled substance. And it can be seen more graphically by reference to other state recidivist laws, which – under the government's theory – would make the ACCA predicates out of offenses that almost universally are regarded as *less* than serious.[9] The effect would be to convert the

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[8] This conclusion should come as no surprise to the government; it previously has argued that the phrase "maximum term of imprisonment that would be authorized" as used in another statute should be read to mean "maximum term of imprisonment authorized *in the law defining the offense*." U.S. Br., 1991 WL 521298, at *14-*15, *United States* v. *R.L.C.*, 503 U.S. 291 (1992) (No. 90-1577) (emphasis added). See also *R.L.C.*, 503 U.S. at 297 ("The Government suggests [that the statute] * * * must mean the maximum term of imprisonment provided for by the *statute defining the offense* * * *.") (emphasis added); U.S. Br. (No. 90-1577), 1991 WL 521298, at *25-*26 (arguing that there is no "reasonable doubt" that the "maximum term of imprisonment" language in the Juvenile Delinquency Act "refers to the maximum statutory penalty"). Invoking the rule of lenity, the Court rejected the government's argument in *R.L.C.* We address that decision in more detail, *infra*, at 44.

[9] Applying the Government's proposed rule could elevate misdemeanor petty offenses or minor drug crimes into "violent

ACCA into a kind of "three strikes" law that is unconcerned with the severity of the offenses that trigger its application.

The government's approach also would have other consequences that could not have been intended by Congress. Thus, the ACCA defines a "violent felony" as:

> Any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another * * *.

18 U.S.C. § 924(e)(2)(B). Under this provision, the "crime" itself must be "punishable by imprisonment for a term exceeding one year." *Ibid.* And because a "crime" is "[a]n act that the law makes punishable" (*Black's Law Dictionary* 399 (8th ed. 2004)), in determining the relevant punishment courts must look

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felonies" or "serious drug offenses" within the ambit of the ACCA. In Michigan, for example, a predicate crime of selling generic Tylenol with codeine would be enhanced under that state's habitual offender statute, Mich. Comp. Laws § 769.12, to fall within the "serious drug offense" ambit of the ACCA. *Cf. People* v. *Maleski*, 560 N.W.2d 71, 75 (Mich. App. 1996). See also *Lockyer* v. *Andrade*, 538 U.S. 63, 66-67 (2003) (discussing enhancement of petty theft conviction to 25-year minimum sentence under Cal. Penal Code § 667(e)(2)(A) (West 1999)); *State ex rel. Chadwell* v. *Duncil*, 474 S.E.2d 573 (W. Va. 1996) (upholding two enhancements of misdemeanor shoplifting, applying a maximum term of imprisonment of ten years and a five year recidivist enhancement).

at the sentence prescribed for the act that constitutes the offense itself.

Yet, as the government recognizes (U.S. Br. 36-37), the rule regarding consideration of recidivism should be the same under the ACCA's "serious drug offense" and "violent felony" provisions. This means that adopting the government's rule in this case would lead to the anomalous result that a *misdemeanor* offense could qualify as a "violent felony." That is so because many states impose increased penalties on repeat offenders convicted of misdemeanor offenses, and these penalties can exceed one year. See, *e.g.*, Tex. Penal Code Ann. § 49.09(b)(2) (Vernon 2007) (driving while intoxicated enhanced from a Class B misdemeanor, with a 180-day maximum term of imprisonment (*id.* at § 12.22), to a third degree felony, with a maximum term of ten years (*id.* at § 12.34), where defendant has two prior DWI convictions). In these instances, although the elements of the offense remain the same, the penalty changes based on the particular facts of the defendant's criminal history.

Congress, however, did not intend for conduct that constitutes only a misdemeanor offense to trigger the ACCA's severe penalties. The "violent felony" category of predicates was intended to cover only serious crimes. See S. Rep. No. 97-585, at 9 (1982) ("The bill expressly includes violations of State law, provided that those violations are *felonies.* * * * [T]he sentences imposed are *immaterial.*" (emphasis added)); *id.* at 70 ("With regard to the prior convictions, the Bill [S. 1688] requires that they be for * * * felonies."); *id.* at 5-6, 62-63 (noting that Congress wrote the ACCA to punish crimes of armed burglary and armed robbery because "these two of-

fenses * * * are the most prevalent, frightening, and harmful of all the violent crimes that could be federally prosecuted."). See also *ACCA Amendment Hearing*, *supra*, at 9-10 n.4 (advocating limiting predicate offenses to those "serious enough in nature that a felony sentence could have been imposed"). To avoid this anomalous result, the Court should exclude consideration of an offender's criminal history when determining whether a crime is a "violent felony" or a "serious drug offense."

5. The government's response to these concerns is the assertion that, because the ACCA is itself a recidivist provision, "it would be incongruous for Congress to ignore the possibility that prior offenses might have been deemed more serious (as measured by the applicable penalty) precisely because the defendant was at that time a repeat offender." U.S. Br. 17. But as we have argued, that approach is flatly inconsistent with the statutory focus on "serious drug offenses" and "violent felonies." It also leads to a sort of perverse bootstrapping, in which a defendant is punished under federal law *for being treated as a recidivist under state law*. That understanding of the statute cannot be squared with the congressional view that "the punishment of imprisonment for at least fifteen years is based entirely on the present offense, *not on the defendant's 'status' as a 'career criminal.'*" S. Rep. No. 98-190, at 8 (1983) (emphasis added). The ACCA provides enhanced punishment for persons convicted of engaging in a set of defined bad acts; the government would read that central purpose out of the statute.

The government also contends that the court of appeals' reading of the ACCA results in the "anomaly" of "treat[ing] repeat offenders as having faced a 'maximum' term that was *lower* than the term for

which they were eligible." U.S. Br. 20-22 (emphasis in original). In fact, as we explain in more detail below (at 38-47, *infra*), it is the government's reading of the statute that creates the real anomaly; its approach treats a defendant as having "actually faced" or having been "eligible for" a sentence *that could not lawfully have been imposed*. In contrast, there is no anomaly at all in the court of appeals' approach. The ACCA provides a formula, based on the maximum possible sentence for the "offense," for determining whether a given offense qualifies as a predicate. Under this formula, the relevant "maximum" prison term, and the one that establishes "seriousness," is that associated with the offense of conviction. The sentence imposed on any given defendant is immaterial in making this "categorical" determination.

II. THE GOVERNMENT'S PROPOSED INTERPRETATION OF THE ACCA WOULD BE UNMANAGEABLE, RAISE CONSTITUTIONAL CONCERNS, AND UPSET THE BALANCE BETWEEN FEDERAL AND STATE COURTS.

Departure from the language and policy of the ACCA is not the only defect in the government's approach. The government's construct also is unworkable, requiring federal courts to engage in difficult inquiries regarding novel questions of state law and complex factual determinations about long-past proceedings in state courts. Because the ACCA was intended to avoid just the sort of "practical difficulties and potential unfairness" (*Taylor*, 495 U.S. at 601) that follow from the government's approach, these concerns militate powerfully against the government's position.

Under the government's rule, a drug offense would count as an ACCA predicate whenever a state defendant was exposed to "the possibility of a valid ten-year sentence" under a state recidivist law. U.S. Br. 19. That would hinge, in the government's view, on whether defendant "actually faced," was "subject to," or "*could* have received" an enhanced recidivist sentence of ten years or more. *Id.* at 14, 20, 19, 22, 25 (emphasis in original). As we understand it – and as the United States has expressly argued in other courts[10] – its test is satisfied so long as the recidivist enhancement could have been sought or imposed, even if it in fact was neither sought by the prosecutor nor imposed by the judge. This test, the government maintains, would be easy and painless to apply; its only discussion of the practicalities of its rule is a

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[10] The government has consistently advanced an argument in the lower courts that the "maximum term of imprisonment * * * prescribed by law" (18 U.S.C. § 924(e)(2)(a)(i)) includes a recidivist enhancement wherever it *could* have applied, even if the enhancement was not actually sought or expressly applied in the state court proceedings. See, *e.g.*, U.S. Br. 11-12, *United States* v. *Henton*, 374 F.3d 467 (7th Cir. 2004) (No. 03-3657) (arguing that "[d]efendant did not have to actually receive an extended sentence in order to be subject to [the recidivist law's] potential penalties" even though state law "does not mandate that an enhanced penalty be imposed" because the recidivism enhancement is "discretionary"); U.S. Br., 2002 WL 32727050, at *7, *United States* v. *Williams*, 326 F.3d 535 (4th Cir. 2003) (No. 01-4551) ("Although the state prosecutor could have filed an application for an extended term of imprisonment at any time before Appellant's sentencing, he did not file one in either case. * * * [H]owever, that is irrelevant. * * * [T]he Appellant had a prior conviction which exposed him to a potential ten year maximum sentence. * * * [I]t is immaterial whether some act by a prosecutor or judge is necessary to trigger the *imposition* of the ten year maximum sentence. What matters is that the statutory scheme in New Jersey envisions repeat drug offenders to be *subject to* enhanced penalties and to be treated as serious drug offenders." (emphasis in original)).

blithe reference to "the ease of making findings concerning recidivist status." U.S. Br. 20.

The government's confidence on this point, however, is misplaced. Determining whether a defendant "could have received" a recidivist enhancement often will be complex, difficult, and time-consuming. It may require a federal court to decide how a state judge would have treated a prior conviction for a different sort of offense committed in an out-of-state jurisdiction. It may obligate a federal court to resolve novel state-law questions about what sorts of crimes constituted "prior" offenses that triggered recidivist treatment. In some circumstances, it will lead to peculiar and inequitable disparities in sentencing. And it will override state choices regarding procedural safeguards for defendants and the exercise of prosecutorial discretion. Such determinations should not be part of the ACCA sentencing process.

A. The Government's Rule Would Require Federal Courts To Decide Complex Questions Of State Law And To Engage In Difficult And Contested Factfinding That Could Raise Serious Constitutional Concerns.

The Court has repeatedly refused to require federal courts applying the ACCA to wade into a quagmire of "evidentiary disputes" and "collateral trials." *Shepard* v. *United States*, 544 U.S. 13, 23 (2005). To avoid "the practical difficulties and potential unfairness of a factual approach" (*Taylor*, 495 U.S. at 601), the Court generally allows federal courts to consider only "the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. The Court carved out a narrow exception to this rule subject to strict limitations. Where a conviction has resulted

from trial, federal courts may look to charging documents and jury instructions and consider only facts that the jury was "actually required to find." *Ibid.* In the guilty plea context, courts are restricted to facts that the defendant "necessarily admitted" through his plea and may consider only the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. In addition to ensuring the manageable application of the ACCA, these restrictions limit judicial factfinding to avoid "serious risks of unconstitutionality." *Id.* at 25.

The government's recidivism rule, however, would require a much more complex and confusing inquiry. Under the government's approach, the federal ACCA court would have to resolve threshold matters of state law. Having done that, the court would confront questions growing out of disputed issues of fact concerning the defendant's prior convictions. These factual questions may be difficult in the best of circumstances. And they may be especially complex because, in applying state recidivist law, state courts are not bound by the ACCA standards announced in *Taylor* and *Shepard* – decisions that, although informed by constitutional considerations, ultimately were interpretations of federal statutory law. Some state courts accordingly look beyond the limited range of documents that may be considered in the ACCA inquiry under *Taylor* and *Shepard* when making state recidivist determinations. When prior convictions were returned in those states, a federal ACCA court therefore would have to look beyond the limited range of *Taylor*/*Shepard* documents to determine whether the defendant "actually faced" a recidivist enhancement. That outcome would raise

significant constitutional concerns and entail precisely the sort of "evidentiary disputes" and "collateral trials" that the *Shepard* Court meant to foreclose.

1. To begin with, determining whether a defendant "actually faced" a recidivist enhancement often will turn on resolution of unsettled issues of state law. To offer just one example, state courts may have to determine whether convictions are sufficiently "prior" to constitute predicate offenses. This inquiry may turn on resolution of complicated questions of state law, as well as consideration of underlying facts. In *Commonwealth* v. *Shiffler*, 879 A.2d 185 (Pa. 2005), for example, the Pennsylvania Supreme Court considered a case in which the lower court had applied the Pennsylvania recidivist law even though the "appellant had pleaded guilty to the three prior burglaries *on the same day* * * *." *Id.* at 188 (emphasis added). After consideration of "the recidivist philosophy of sentencing" (*id.* at 188), the supreme court reversed, concluding that the enhancement should apply "only where [an offender's] convictions * * * and corresponding terms of incarceration, are sequential and each is separated by an intervening opportunity to reform" (*id.* at 186). Other courts have reached similar conclusions in respect to similar provisions in their state recidivist laws. See, *e.g.*, *People* v. *Nees*, 615 P.2d 690, 693 (Colo. 1980); *Graham* v. *State*, 435 N.E.2d 560, 561 (Ind. 1982); *Bray* v. *Commonwealth*, 703 S.W.2d 478, 479-80 (Ky. 1986); *Koonsman* v. *State*, 860 P.2d 754, 755-56 (N.M. 1993); *State* v. *Allison*, 923 P.2d 1224, 1228-29 (Or. Ct. App. 1996); *State* v. *Gehrke*, 474 N.W.2d 722, 724-26 (S.D. 1991).

Some state courts considering substantially similar statutory language, by contrast, have held that

recidivist enhancements *do* apply for simultaneous convictions or plea agreements that correspond to separate indictments and separate incidents. In *People* v. *Wiley*, 889 P.2d 541 (Cal. 1995), for example, the California Supreme Court considered a case where a defendant had been "convicted in court trials occurring only one day apart, and * * * sentenced in both cases during the same court session." *Id.* at 593. There, the court noted that the "proper application of the requirement that the prior charges be 'brought and tried separately,' * * * frequently depends upon the interpretation of complex and detailed provisions of California criminal procedure." *Id.* at 590 (quoting Cal. Penal Code § 667(a)). Moreover, "there are, of course, some underlying 'facts' that are relevant to the determination as to whether charges have been 'brought and tried separately * * *.'" *Ibid.* Ultimately, the court determined that because the cases had different case numbers, one could be considered prior to the other. *Id.* at 593. For similar examples, see *State ex rel. Collins* v. *Superior Court*, 689 P.2d 539, 540-41 (Ariz. 1984); *Cornwell* v. *United States*, 451 A.2d 628, 629-30 (D.C. 1982); *Smith* v. *State*, 584 So. 2d 1107, 1108 (Fla. Dist. Ct. App. 1991), overruled on other grounds by *Jeffries* v. *State*, 610 So. 2d 440 (Fla. 1992); *Philmore* v. *State*, 428 S.E.2d 329 (Ga. 1993).

Under the government's rule, a federal sentencing court – determining under the ACCA whether a state recidivist law could have applied to a given offender – would have to decide precisely the same sort of complex legal questions. Sometimes these questions will raise a matter of first impression regarding *state* law that, under the government's approach,

could be resolved only after a lengthy *federal* proceeding.[11]

2. If anything, the factual questions presented by the government's "actually faced" inquiry will be even more complicated than the legal ones. Most states, for example, permit a prior conviction in another jurisdiction to serve as a predicate offense under their own recidivist laws, when the out-of-jurisdiction crime is the same or similar to a predicate offense under the home state's laws. Federal courts applying state recidivist laws *ex post* would therefore frequently have to determine whether an out-of-jurisdiction conviction would constitute a predicate offense if it had been committed in-jurisdiction. In addition to presenting complicated

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[11] In fact, the Washington convictions at issue in this case may present just such an example. Although the government contends that there is "no dispute in this case that * * * respondent was subject to a maximum term of imprisonment of ten years on each of his three convictions under Washington law * * *" (U.S. Br. 14), that is not so. The basis for this contention is an admission in respondent's plea agreement that "[t]he crime with which I am charged carries a maximum sentence of 10 years imprisonment and a $20,000 fine." J.A. 28. It is unclear, however, whether respondent was in fact subject to the enhancement. As in *Shiffler*, respondent's prior convictions were entered on the same date. See U.S. Br. 4 n.2. Yet Washington's recidivist statute subjects to enhancement any person "convicted of a second or subsequent offense under this chapter" (Wash. Rev. Code § 69.50.408(a) (1994)), and "an offense is considered a second or subsequent offense, if, *prior* to his or her conviction of the offense, the offender has at any time been convicted [of an offense] relating to narcotic drugs * * *" (*id.* § 69.50.408(b) (emphasis added)). It does not appear that Washington courts have addressed whether, under this statute, one conviction may serve as a predicate offense for another conviction entered on the same day. *Cf. State* v. *Jones*, 244 P. 395 (Wash. 1926) (holding that original state recidivist statute did not apply to a defendant who pled guilty to three separate informations on the same day).

legal questions, these inquiries often turn on the determination of facts underlying out-of-jurisdiction convictions.[12]

To offer one characteristic example of the complexity of this sort of factual inquiry, in *People* v. *Fumai*, 828 N.Y.S.2d 79 (N.Y. App. Div. 2006), the

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[12] Some states require substantial similarity or near equivalence between out-of-jurisdiction convictions and in-jurisdiction offenses in the application of general recidivist enhancements. See, *e.g.*, 730 Ill. Comp. Stat. § 5/5-5-3.2(b)(1); N.C. Gen. Stat. § 15A-1340.14(e); Tenn. Code Ann. § 40-35-107(b)(5); Tex. Penal Code Ann. § 12.42(c)(2)(b)(v). Pennsylvania employs a substantial similarity provision in respect to its drug recidivist law. See 18 Pa. Cons. Stat. § 7508(a.1).

Other states require convictions in other jurisdictions to include all or most of the elements that would constitute a violation in the home state, or elements "similar" to those of the home-state offense, in respect to their general recidivist enhancements. See, *e.g.*, Alaska Stat. § 12.55.145(a)(1)(B); Cal. Penal Code § 667.5(f); Conn. Gen. Stat. § 53a-40; D.C. Code § 22-1804(a). New York applies a "same elements" provision with respect to its violent felony recidivist enhancement. See N.Y. Penal Law § 70.04(b)(i).

Still other states count out-of-jurisdiction convictions as predicates under their general recidivist laws where the crime, if committed within the State, would constitute a felony in-jurisdiction. See, *e.g.*, Ala. R. Crim. Pro. 26.6(b)(3)(iv); Colo. Rev. Stat. § 18-1.3-801(1.5); Fla. Stat. § 775.082(9)(a)(1); La. Rev. Stat. § 15:529.1(A)(1); Mich. Comp. Laws § 769.10(1); Okla. Stat. Ann. tit. 21, § 54; Or. Rev. Stat. § 161.725(3)(c); S.D. Codified Laws § 22-7-7; Vt. Stat. Ann. tit. 13, § 11; Wash. Rev. Code § 9.94A.030(21)(c).

Finally, other states look to the length of sentence imposed or authorized in the foreign jurisdiction, raising the additional question of whether a *third* layer of recidivist enhancements may apply to qualify a later offense as an ACCA predicate. See, *e.g.*, Ky. Rev. Stat. Ann. § 532.080(2); Miss. Code Ann. § 99-19-83; Neb. Rev. Stat. § 29-2221; N.J. Stat. § 2C:44-4(c); Nev. Rev. Stat. § 207.010(1)(a); N.H. Rev. Stat. § 651:6(II)(a); N.M. Stat. § 31-18-17(D)(2)(c); N.D. Cent. Code § 12.1-32-09(1)(c); R.I. Gen. Laws § 12-19-21; Utah Code Ann. § 76-3-203.5(1)(a).

state court was asked to determine whether the defendant's prior narcotics conviction in Connecticut qualified him for enhanced penalties. The applicability of New York's recidivist enhancement turned on the precise identity of the controlled substance involved in the Connecticut conviction because the Connecticut drug statute covered some substances that would not trigger the enhancement. *Id.* at 80-81. Because the prosecutor in that case "failed * * * to present any evidence as to which 'narcotic substance,' * * * was at issue in the Connecticut case," the appellate court could not determine whether the recidivist enhancement applied. *Ibid.*[13]

Similarly, in *People* v. *McGee*, 133 P.3d 1054 (Cal. 2006), the California court had "to determine whether the [out-of-jurisdiction] conviction alleged qualifies as a conviction under the applicable [California] sentence-enhancement provision." *Id.* at 1062. There the court noted that sometimes "this determination is purely legal," while "[s]ometimes the determination does have a factual content." *Id.* at 1061. In that case, "it was at least theoretically possible that defendant's Nevada convictions involved conduct that would not constitute robbery under California law." *Id.* at 1057. To reach a legal conclusion whether the Nevada convictions "qualifie[d]," the trial court had to review record evidence about the defendant's underlying conduct to "make a factual determination about [the] criminal defendant's intent" and to determine whether the Nevada

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[13] This type of inquiry takes substantial time. Determining whether there were relevant differences in the substances regulated by another jurisdiction on the date of the prior conviction may involve comparing lengthy lists of substances contained in old and possibly superseded regulations.

robberies involved acts of "force or fear." See *People* v. *McGee*, 9 Cal. Rptr. 3d 586, 595-97 (Cal. Ct. App. 2004). These facts were contested; the court reached a determination as to the defendant's intent and use of force in the prior convictions only following a review of testimony contained in transcripts from the preliminary hearings and trials. See *McGee*, 133 P.3d at 1057-58.[14]

When faced with a predicate conviction from a jurisdiction that, like California, allows consideration of such materials in determining of the applicability of the recidivist enhancement, the government's approach presents the federal ACCA court with a dilemma. Deciding whether an offender was actually subject to the recidivist enhancement under similar circumstances would require the court to consider materials that were placed out-of-bounds by *Taylor* and *Shepard*. Yet that kind of inquiry would raise serious constitutional concerns.[15] In *Shepard*, the

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[14] The California Supreme Court noted that the case "present[ed] a serious constitutional issue" under *Taylor* and *Shepard*, but nevertheless concluded that a trial judge may conduct "an examination of the record of the earlier criminal proceeding [if it] is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law." *McGee*, 133 P.3d at 1069-71.

[15] Other examples of state court decisions grappling with the question whether out-of-jurisdiction crimes constitute recidivist predicates abound. These cases typically require complicated determinations of both fact and law. See, *e.g.*, *Timothy* v. *State*, 90 P.3d 177 (Alaska Ct. App. 2004), overruling *Butts* v. *State*, 53 P.3d 609, 616 (Alaska Ct. App. 2002) (Oklahoma conviction did not qualify as a predicate offense because the Oklahoma statute covered entry into all motor vehicles while Alaskan law applied only to vehicles adapted for overnight accommodation of persons); *State* v. *Joyner*, 158 P.3d 263, 267 (Ariz. Ct. App. 2007) (because armed robbery may be committed with a simulated deadly weapon in foreign jurisdiction, it does not necessarily constitute a prior vio-

Court held that the "Sixth and Fourteenth Amendments guarantee * * * a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence," even where "the disputed fact * * * can be described as a fact about a prior conviction." *Shepard*, 544 U.S. at 25. But relying on the entire "record of conviction" (*McGee*, *supra*) when applying a recidivist statutes would "ease away" evidentiary limitations (*Shepard*, 544 U.S. at 23), permitting a "wider evidentiary cast" (*id.* at 21). As the *Shepard* Court recognized, such factfinding entails "serious risks of unconstitutionality." *Id.* at 25.

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lent felony); *People* v. *Rodriguez*, 18 Cal. Rptr. 3d 550, 560-61 (Cal. Ct. App. 2004) (because "habitation" under Texas law was different from "inhabited dwelling" under California law, Texas conviction did not qualify as a serious felony in California); *Robinson* v. *State*, 692 So. 2d 883, 887-88 (Fla. 1997) (robbery by sudden snatching under Georgia law was not a qualified offense under Florida's habitual offender statute because the Georgia robbery statute required a lower level of force than Florida law); *State* v. *Carouthers*, 618 So. 2d 880, 882 (La. 1993) (when assessing out-of-state convictions for habitual offender purposes, courts must determine the analogous Louisiana state crime according to the conduct of the offender); *Commonwealth* v. *Shaw*, 744 A.2d 739, 743 (Pa. 2000) (providing detailed considerations to determine whether a foreign conviction is an "equivalent offense" including instruction to "discern whether the crime is malum in se or malum prohibitum"); *State* v. *Webb*, No. E2006-00736-CCA-R3-CD, 2007 WL 642071, at *5 (Tenn. Crim. App. Mar. 5, 2007) (the court could not determine whether defendant's prior convictions would have been felonies or misdemeanors under Tennessee law because Tennessee gambling law requires involvement of two or more persons); *Cox* v. *Commonwealth*, 411 S.E. 2d 444, 446 (Va. Ct. App. 1991) (courts must determine if out-of-state criminal statute permits convictions that would not be allowed under Virginia law); *State* v. *Bunting*, 61 P.3d 375 (Wash. App. 2003) (reversing enhanced sentence because the indictment for the out-of-state prior conviction did not properly allege the ownership element of armed robbery required by Washington law); *State* v. *Hulbert*, 544 S.E.2d 919 (W. Va. 2001) (out-of-state convictions apply only when "the factual predicate upon which the prior conviction was obtained would have supported a conviction under West Virginia" law).

But precluding consideration of such materials by the federal court would raise problems of its own, leading to the sort of inconsistency in sentencing that Congress sought to avoid in the ACCA. If a California state court conducting an unbounded evidentiary inquiry determined that the recidivism enhancement applied and *actually* enhanced the defendant's sentence, the offense would qualify as an ACCA predicate under the government's rule because the enhancement would be obvious on the face of the sentencing papers. By contrast, if the same state court, considering an identical defendant with an identical criminal history, exercised its discretion not to apply the enhancement, a federal court restricted by *Taylor* and *Shepard* would be unable to determine whether the defendant was "actually" exposed to the enhanced sentence. The offense thus would *not* qualify as an ACCA predicate – even though the defendant *was* actually exposed to the enhanced sentence – simply because the question was litigated in a federal court rather than a state court. So however the federal court resolves the dilemma posed by the government's theory in this case, undesirable consequences will follow.

3. The brief discussion above, of course, does not exhaust the types of difficult issues that will arise in determining the "possibility" of a recidivist enhancement. Quite the contrary. State courts have recognized in a range of circumstances the extensive and complicated factfinding and legal decisionmaking necessary to determine whether offenders were subject to state recidivism laws. See, *e.g.*, *State* v. *Bray*, 160 P.3d 983, 990 (Or. 2007) (state recidivist law requires factual and legal determination whether the defendant's criminal history is "sufficiently continuous or recurring to say that it is 'per-

sistent'"); *State* v. *Bell*, 931 A.2d 198, 221 (Conn. 2007) (observing that recidivist law, which applies only where "extended incarceration and lifetime supervision will best serve the public interest" requires factual findings by a jury to satisfy *Apprendi*); *People* v. *Tatta*, 610 N.Y.S.2d 280, 280 (N.Y. App. Div. 1994) (determining "whether the amount of time that the defendant spent as an escapee from custody may be used to toll the 10-year limitation period in Penal Law § 70.06(1)(b)(iv) for the purpose of determining his status as a second felony offender," and concluding that sentencing courts must determine when prior convictions took place and whether and for how long the defendant actually was incarcerated for each).

4. The government could not avoid these myriad problems by urging a rule that counts a prior conviction as an ACCA predicate only when a state court has actually applied the enhancement. Frequently, it will be unclear whether the enhancement actually was applied in the state proceeding. State court records may be unavailable, or may not include this information. In a state where eligibility for an enhancement depends on the prosecutor filing notice of the enhancement, a disputed factual question may arise regarding whether notice was provided. In a state where an enhancement applies automatically if a defendant has a qualifying prior conviction, the enhancement presumably would be deemed applied even if there is no indication in the state record of its application. In these cases, the federal sentencing court would need to engage in the type of complicated legal and factual inquiries described above to determine whether a defendant's prior conviction actually triggered the state enhancement.

Moreover, it will not always be clear whether a potential ACCA predicate conviction comes from a state where an enhancement applies "automatically" rather than one where it applies only when a judge or prosecutor makes a discretionary decision to apply it. In Washington, for example, the lower courts are divided on whether the recidivist provision (Wash. Rev. Code § 69.50.408) in fact applies automatically, as the government has argued (J.A. 197, U.S. Br. 8), or applies only at the discretion of the judge or prosecutor. Compare *State* v. *O'Neal*, 109 P.3d 429, 446 (Wash. App. 2005) (acknowledging discretion); *State* v. *Mayer*, 86 P.3d 217, 221 (Wash. Ct. App. 2004) (same); *State* v. *Cameron*, 909 P.2d 309, 312 (Wash. App. 1996) (same), with *In re Hopkins*, 948 P.2d 394, 397 (Wash. App. 1997), rev'd, 976 P.2d 616 (1999) (appellate court held that enhancement was required and not discretionary, but state supreme court reversed prior to reaching the question).[16] Thus, to determine whether a conviction qualifies as an ACCA predicate, federal sentencing courts would have to determine the precise procedural rules that apply in various states regarding enhancements.

Finally, even where it is clear from state records that the state court actually applied a recidivist enhancement, the state court may have applied the enhancement after resolving disputed facts about the defendant's conduct underlying the prior conviction. Such findings raise serious constitutional concerns (see *Shepard*, 544 U.S. at 25-26 (plurality opinion)),

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[16] The language of Washington's recidivist statute is permissive, not mandatory: "Any person convicted of a second or subsequent offense under this chapter *may* be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both." Wash. Rev. Code § 69.50.408(1) (emphasis added).

and the ACCA should not be read in a manner that would compound these errors.[17]

B. The Government's Rule Will Undermine The States' Prerogative To Determine The Procedures Necessary To Invoke Recidivist Enhancements, Upsetting The Balance Between Federal And State Courts Drawn By Congress In The ACCA.

In addition to injecting complexity and inconsistency into the ACCA sentencing process, the government's approach would work a significant interference with state criminal procedures and the exercise of state prosecutorial discretion. Recognizing that complicated and disputed factfinding often occurs in the application of recidivist laws, many states have established safeguards to ensure that recidivist statutes apply only where certain procedural standards are satisfied. But the government's reading of the ACCA would lead federal courts to disregard these guarantees. Such an outcome could not be reconciled with Congress's goal in the ACCA to "preserve a strong concept of Federalism." H.R. Rep. No. 99-849, at 3 (1986).

Some states, for example, require that a jury find the fact of prior conviction beyond a reasonable doubt. See, *e.g.*, Tex. Penal Code § 12.42; *Talley* v. *State*, 909 S.W.2d 233, 236 (Tex. App. 1995); *Wash-*

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[17] Reading the ACCA to count these convictions as predicates will encourage defendants to try to vacate these sentences in state court. If they are successful, they will then be able to return to federal court to challenge their the ACCA sentences under 28 U.S.C. § 2255. See *Johnson* v. *United States*, 544 U.S. 295 (2005).

ington v. *Commonwealth*, 616 S.E.2d 774, 778 (Va. Ct. App. 2005). Under the government's rule, however, federal courts would not be bound by the same procedural restrictions. Federal courts might therefore determine that an offender was subject to a recidivism enhancement based on a preponderance of the evidence, even where disputed facts would not have been proven beyond a reasonable doubt. The government's proposed rule would thus undermine the states' prerogative to determine the legal process for factfinding that criminal defendants are due in the application of state recidivism laws.

Other states require that prosecutors provide notice before seeking a recidivism enhancement. See, *e.g.*, N.Y. Crim. Pro. Law § 400.20(4); Va. Code Ann. § 19.2-297.1; *Rollinson* v. *State*, 743 So. 2d 585, 589 (Fla. Dist. Ct. App. 1999); *Commonwealth* v. *Fernandes*, 722 N.E.2d 406 (Mass. 1999). But having federal courts determine whether offenders *could have* been subject to such an enhancement, even when notice was not provided, would effectively override states' notice requirements, counterfactually applying the enhancement without notice.

In addition, counterfactual application of a recidivist enhancement would usurp a state prosecutor's discretion not to seek such an enhancement in the first instance. See, *e.g.*, *Portalatin* v. *Graham*, 478 F. Supp. 2d 385 (E.D.N.Y. 2007) (recognizing prosecutorial discretion to seek recidivist enhancement); *State* v. *Parks*, 553 S.E.2d 695 (N.C. App. 2001) (same); *Commonwealth* v. *Daniels*, 656 A.2d 539 (Pa. Super. Ct. 1995) (same); *State* v. *Klemke*, 537 N.W.2d 149 (table) (Wis. Ct. App. 1995) (recognizing court's discretion to apply enhancement). A prosecutorial decision not to seek a recidivist enhancement, even when the defendant actually was

subject to it, represents a decision that the defendant did not warrant the higher sentence. Under the government's rule, later federal sentencing courts would set aside those decisions and consider the enhancements nevertheless.

Other states provide safety valves that allow courts to renounce application of a recidivist enhancement. In California, for example, courts may "strike a strike" by "dismiss[ing] prior felony conviction allegations in furtherance of justice on [the court's] own motion in a case brought under the Three Strikes law." *People* v. *Romero*, 917 P.2d 628, 632 (Cal. 1996). There, the trial court struck the prior conviction "in the interest of justice." *Id.* at 632 (quoting *People* v. *Burke*, 301 P.2d 241, 244 (Cal. 1956)). For a federal sentencing court to later count such a conviction as an ACCA predicate because the defendant was "eligible" for an enhancement would override the state's decision about how to treat the case.[18]

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[18] As the government notes, "some members of the Court" have suggested that *Almendarez-Torres* should be overruled. U.S. Br. 27 n.10. That possibility provides a further practical reason to avoid adopting the government's rule in this case. If the Court overrules *Almendarez-Torres* and holds that recidivism must be submitted to a jury and proved beyond a reasonable doubt, the federal courts will be flooded with challenges by defendants to their ACCA-enhanced sentences – even if the Court holds that the rule is not retroactive to federal cases. Defendants sentenced to enhanced terms under the ACCA could still launch Sixth Amendment challenges in state courts against their improperly enhanced predicate state-court convictions, as many state courts have held that they are free to reject this Court's retroactivity holdings. See, *e.g.*, *Daniels* v. *State*, 561 N.E.2d 487, 489 (Ind. 1990); *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292, 1296-97 (La. 1992); *State* v. *Whitfield*, 107 S.W.3d 253, 266-68 (Mo. 2003); *Colwell* v. *State*, 59 P.3d 463, 470-71 (Nev. 2002); *Cowell* v. *Leapley*, 458 N.W.2d 514, 517-18 (S.D.

III. THERE IS NO PRINCIPLED BASIS FOR DISTINGUISHING BETWEEN COLLATERAL SENTENCING ENHANCEMENTS LIKE RECIDIVISM AND MANDATORY SENTENCING GUIDELINES THAT CAP SENTENCES.

The defect in the government's theory is demonstrated most graphically by an evident flaw of logic at the heart of its case. The government insists that the dispositive consideration under the ACCA is the sentence the defendant "actually faced" or "*could* have received." U.S. Br. 21-22 (emphasis in original). That is so, the government maintains, because Congress contemplated floating "maximum terms of imprisonment" for different categories of offenders; therefore, in the government's view, the increased penalty that a repeat offender "actually face[s]" under a recidivist statute bumps up the relevant maximum term. But the government lacks the courage of its convictions: it insists that other, equally binding provisions of state law that *reduce* the sentence actually faced by categories of defendants must be ignored for ACCA purposes.

This case illustrates the point. As the government concedes (see U.S. Br. 28), the Washington sentencing guidelines that were in force at the time of respondent's convictions – and that were mandatory and binding under state law – capped the maximum

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1990). *Cf. Danforth* v. *State*, 718 N.W.2d 451 (Minn. 2006), cert. granted, 127 S. Ct. 2427 (2007). Upon successful challenges to ACCA predicates in state court, these defendants could return to federal court to challenge their ACCA-enhanced sentences. See *Johnson* v. *United States*, 544 U.S. 295 (2005). Therefore, adopting the government's proposed rule in this case could create an unnecessary flood of litigation in state and federal courts if this Court does overrule *Almendarez-Torres*.

term to which he could be sentenced at fifty-seven months. That period is less than the five-year statutory maximum for his offense and well below the ten-year ACCA trigger. Under controlling state law, *that* was the maximum term that respondent "actually faced" or "*could* have received."

For reasons we have explained, we believe that the ACCA is best regarded as focusing on the maximum penalty that the legislature associated with the offense of conviction – in this case, five years. But if that submission is rejected and the focus properly is on the term that the defendant "actually faced," the government offers no coherent reason for taking account of the recidivism enhancement and *not* the equally binding guidelines limit. The government's test appears to be a sort of unprincipled one-way ratchet that drives sentences up but not down. And that is not a proper basis for construing a criminal statute that imposes severe, mandatory prison terms on defendants.

1. Numerous states have sentencing guidelines that, absent a finding of or admission to aggravating factors, cap the maximum term of imprisonment for any given offense at a level *below* that set by the statute defining the offense. Application of the sentencing ranges prescribed by these determinate sentencing systems is mandatory.

Respondent was sentenced under the Washington guidelines regime subsequently addressed by this Court in *Blakely* v. *Washington*, 542 U.S. 296 (2004). Under the system as it operated prior to *Blakely*, Washington recognized a "standard range" for each offense. *Id.* at 299. State judges could impose "exceptional sentence[s]" exceeding the standard range only after finding certain aggravating

factors. *Ibid.* Because the sentencing judge found no such factors in respondent's case, the standard range was binding and the guidelines therefore capped his sentence at fifty-seven months, notwithstanding the statutory maximum of five years prescribed for his offense and the recidivism statute invoked by the government.

In *Blakely*, the Court held that allowing judicial findings of aggravating factors to increase the defendant's sentence above the statutory maximum violates the Sixth Amendment. 542 U.S. at 308. Respecting the Washington sentencing system, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). See also *Cunningham* v. *California*, 127 S. Ct. 856, 865 (2007) ("Because the judge in *Blakely*'s case could not have imposed a sentence outside the standard range without finding an additional fact, the top of that range – 53 months, and not 10 years – was the relevant statutory maximum."). Accordingly, in states affected by *Blakely*, sentencing guidelines – absent additional facts charged by the prosecutor and either found by a jury or admitted by a defendant – typically mandate a sentence *below* the maximum written into the underlying offense.[19]

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[19] *Blakely* has affected the sentencing regimes of many states. These states generally have revised their sentencing statutes to require juries to find aggravating facts that increase a sentence beyond the standard range prescribed by the guidelines. See Alaska Stat. § 12.55.155(f); Ariz. Rev. Stat. Ann. § 13-702.01(J); Kan. Stat. Ann. §§ 21-4716(b), 27-4718(b); Minn. Stat. § 244.10, subdiv. 5; N.C. Gen. Stat. § 15A-1340.16(a1); Or. Rev. Stat. § 161.735(6); Wash. Rev. Code § 9.94A.537(3). The Colorado Su-

2. If the government's theory of the sentence "actually faced" by the defendant is correct, recidivist enhancements cannot be distinguished from state sentencing guidelines that *mandate* sentences within a presumptive range. When state sentencing guidelines like Washington's cap a defendant's maximum term at a lower level, a defendant is not *eligible* for a term of imprisonment equivalent to the maximum included in the offense itself. Because the government's proposed rule turns on the maximum sentence a defendant "actually faced," determinative guidelines systems that cap a maximum term accordingly must, under that theory, be relevant to the application of the ACCA.

Indeed, if the government is correct and collateral factors like recidivism are relevant to the ACCA, this Court has already settled that sentencing guide-

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preme Court has adopted this approach as well. *Lopez* v. *People*, 113 P.3d 713, 716 (Colo. 2005).

Other states affected by *Blakely* necessarily have found that sentences premised on judicial factfinding in violation of *Apprendi* violate the Sixth Amendment, but many have yet to respond systematically to *Blakely*, further demonstrating the inherent complexity of the government's approach. See, *e.g.*, *People* v. *Black*, 161 P.3d 1130, 1135-38 (Cal. 2007) (applying *Blakely* and *Cunningham* to hold that sentences in excess of presumptive range require factfinding approved by *Apprendi*); *State* v. *Maugaotega*, 168 P.3d 562, 573-76 (Haw. 2007) (finding same for Hawaii's guidelines); *State* v. *King*, 168 P.3d 1123, 1127-29 (N.M. Ct. App), cert. granted, 169 P.3d 409 (N.M. 2007) (finding same for New Mexico's guidelines); *State* v. *Gomez*, No. M2002-01209-SC-R11-CD, 2007 WL 2917726, at *5-6 (Tenn. Oct. 9, 2007) (finding same for Tennessee's guidelines).

Some state courts have suggested that their state legislatures resolve *Blakely* and *Cunningham* questions. See, *e.g.*, *State* v. *Natale*, 878 A.2d 724, 741 (N.J. 2005); *State* v. *Foster*, 845 N.E.2d 470, 495 (Ohio 2006). See also *Cunningham*, 127 S. Ct. at 871 n.17 (listing examples of States that have amended sentencing guidelines to require a jury to find aggravating facts).

lines must also be taken into account when calculating "the maximum term of imprisonment." *R.L.C.*, 503 U.S. at 295-96. *R.L.C.* involved the application of 18 U.S.C. § 5037(c), which provided that a juvenile may not receive a sentence in excess of "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." *R.L.C.*, 503 U.S. at 296 (quoting 18 U.S.C. § 5037(c)(2)(B)(ii)). The Court rejected the government's argument that "'authorization' refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines to be applied under statutory mandate * * *." *Id.* at 297. Instead, the Court held that the relevant term of imprisonment was set by the federal guidelines. *Id.* at 306.

The government attempts to distinguish *R.L.C.* on the ground that the statute there at issue "expressly contemplated an offender-specific maximum sentence," while the ACCA focuses on the term available "for the underlying *offense*." U.S. Br. 34 (emphasis in original). But as we have explained, the government's attack on the holding below is premised on precisely the opposite proposition: that the ACCA is an "offender-specific" statute that takes account of varying sentences that may be imposed on different categories of defendants. And the very sort of anomaly that the government believes explains *R.L.C.* – that, because of the binding effect of the guidelines, a juvenile could have been sentenced to a longer term than an identically situated adult (see U.S. Br. 34-35) – is present here: the government

would treat a defendant as "eligible" for a sentence that he or she could not lawfully serve.[20]

In fact, the government offers no explanation for why it makes sense to consider recidivist enhancements but not guidelines caps. The closest it comes is when it asserts that, while the language of the ACCA "accommodates the possibility of alternative 'maximum term[s] of imprisonment' prescribed by statute for recidivists and non-recidivists, it does not contemplate a different "maximum term of imprisonment' for *every* offender." U.S. Br. 29. But this contention is wrong on two scores. Guidelines regimes typically do not set a "different" maximum term for each offender; the Washington guidelines applied to respondent set a cap lower than the ACCA minimum for all defendants convicted of his offense, absent proof of aggravating factors. And the government, in any event, does not even attempt to explain *how* the language of the ACCA accommodates variation of one sort but not of the other.

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[20] The government finds no support in *United States* v. *Murillo*, 422 F.3d 1152 (9th Cir. 2005), cert. denied, 547 U.S. 1119 (2006), cited at U.S. Br. 29. In interpreting Section 922(g), the Ninth Circuit found that "the maximum sentence is the statutory maximum sentence *for the offense*, not the maximum sentence available in the particular case under the sentencing guidelines." *Murillo*, 422 F.3d at 1154 (emphasis added). Respondent agrees that the Court's inquiry should be limited to the maximum term of imprisonment *for the offense*, which would preclude relying on either state sentencing guidelines *or* recidivist enhancements. The Ninth Circuit took the same approach in *United States* v. *Parry*, 479 F.3d 722, 725-26 (9th Cir.), cert. denied 128 S. Ct. 249 (2007) (considering penalty "for the offense rather than the term the defendant could "actually" spend in prison). Neither decision suggested that the term set for the "offense" is modified by a possible recidivist enhancement.

The government's further observation that Congress did not anticipate this Court's decisions in *Blakely* and *Apprendi* (U.S. Br. 31) is beside the point.[21] Both pre- and post-*Blakely*, binding guidelines set the sentence for which the defendant was "eligible"; under the government's test, that is what matters. Indeed, especially in states that have "*Blakely*-ized" their guidelines to require that juries find the existence of aggravating circumstances that increase the sentence faced by the defendant, there is a strong argument that *the guidelines themselves* define the "offense" for purposes both of state law and of the ACCA. The government's insistence that even such post-*Blakely* guidelines do not affect the maximum sentence that is considered under the ACCA – but that recidivist enhancements do – powerfully demonstrates that its approach lacks any grounding in law or principle.

3. In this case, the Washington sentencing guidelines established that the maximum sentence respondent "actually faced" for his drug convictions was significantly less than ten years. Respondent pleaded guilty to delivery of a controlled substance

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[21] Even if true, it also would be beside the point that, as the government contends, Congress did not have guidelines at the forefront of its mind when it enacted the ACCA. U.S. Br. 31-32. The government's theory is that the relevant inquiry looks to the sentence the defendant "actually faced" (*id.* at 21); if that were so, Congress would have had no reason to distinguish between state-law recidivist enhancements and sentencing guidelines. Moreover, as the government acknowledges (see *id.* at 31-32), Congress was in fact aware that many states had reformed their sentencing laws in the years immediately preceding passage of the ACCA. See, *e.g.*, Alaska Stat. § 12.55.005 (2007) (Alaska sentencing reform enacted in 1978); 1978 Minn. Laws 723 (enacting Minnesota determinate sentencing system in 1978); Wash. Rev. Code § 9.94A.905 (Washington sentencing law was reformed in 1983).

from "Schedule III-V" in violation of Wash. Rev. Code § 69.50.401(a)(1)(ii)-(iv) (1994). The maximum sentence specified by that statute was five years. *Ibid.* The sentencing range in place at the time of respondent's sentencing, which took account of respondent's criminal history, was 43-57 months. J.A. 42, 93. See also Wash. Rev. Code § 9.94A.310 (1994). Because no aggravating facts were charged by the prosecutor, admitted by respondent, or found by the judge, the maximum term of imprisonment that respondent "actually faced" at the time – and, under *Blakely*, the maximum term to which he constitutionally could have been sentenced – was fifty-seven months.

If defendant-specific factors like recidivism are found relevant to the ACCA, respondent's "maximum term of imprisonment * * * prescribed by law" for the Washington convictions was fifty-seven months. Under the government's theory, this conviction is thus insufficient to qualify as an ACCA predicate offense.[22]

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[22] The government is incorrect in asserting that respondent acknowledged in his brief in opposition to the petition for certiorari that he failed to make this argument below and, for that reason, waived any argument that the relevant ACCA "maximum term" in his case is that set by the guidelines. U.S. Br. 28. The language from the brief in opposition cited by the government stated only that "[w]e are not arguing here that the judgment below should be upheld because respondent's maximum sentence was limited [under Washington's guidelines]. Rather, we are pointing out the bizarre consequences of the government's self-contradictory rule." Br. in Opp. 15 n.7. As the opposition explained, our principal argument relating to the guidelines is that they demonstrate the flaw in the government's theory.

But if the Court concludes that it may look beyond the sentence associated with the offense of conviction in determining the sentence for the ACCA purposes, respondent should be free to contend that the sentence he "actually faced" was the guide-

4. Three conclusions follow from consideration of the sentencing guidelines. First, as suggested above, our principal submission is that the Court should avoid the serious complications created by consideration of collateral sentencing factors like recidivism, as well as of the guidelines, by focusing the ACCA inquiry on the sentence associated by the legislature with the crime of conviction – the rule that follows from the statutory language and purpose. Second, the government's dismissal of the guidelines demonstrates the incoherence of its case. And third, if the government's approach to the ACCA nevertheless is accepted, respondent's sentence fell well short of the ACCA trigger. However it is sliced, then, the decision below should be affirmed.

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lines sentence. He argued below that his sentence did not qualify as an ACCA predicate; the guidelines argument is simply an elaboration of that position. Moreover, given the holdings of both courts below in respondent's favor, they would not have reached the relevance of the guidelines point had it been pressed. And respondent, as the prevailing party, may "assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 476 n.6 (1970). See also *United States* v. *Am. Ry. Exp. Co.*, 265 U.S. 425, 436 (1924) (holding that a party may "assert[] additional grounds why the decree should be affirmed"); Illinois v. Gates, 462 U.S. 213, 219-20 (1983) (quoting *Dewey* v. *Des Moines*, 173 U.S. 193, 197-98 (1899)) (holding that parties "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed" and questions presented below may be "enlarge[d]").

IV. BECAUSE THE NATION'S SENTENCING REGIMES HAVE CHANGED SIGNIFICANTLY SINCE THE ENACTMENT OF THE ACCA, ANY AMBIGUITY IN THE STATUTE SHOULD BE RESOLVED BY CONGRESS, NOT THE COURTS.

Finally, one additional consideration cuts strongly in favor of respondent. We contend that the plain meaning and policy of the ACCA support the view that, in determining whether an "offense" is one "for which a maximum term of imprisonment of ten years or more is prescribed by law," courts should look solely at the sentence associated with the offense itself. But to the extent that the proper interpretation of the ACCA is unclear, the rule of lenity dictates that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). See also *Lewis* v. *United States*, 445 U.S. 55, 65 (1980) (noting that the rule of lenity applies in situations where the meaning of a statutory provision is ambiguous). The rule is "an outgrowth of [the Court's] reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Simpson* v. *United States*, 435 U.S. 6, 15-16 (1978). It is a key principle of statutory construction that "criminal statutes, including sentencing provisions, are to be construed in favor of the accused" (*Taylor*, 495 U.S. at 596), and this principle applies with equal force to sentencing and substantive provisions. See *R.L.C.*, 503 U.S. at 305; *Simpson*, 435 U.S. at 15; *Bifulco*, 447 U.S. at 387.

It bears emphasis that the lenity principle applies with special force in this case because the sentencing world has undergone convulsive changes since the enactment of the ACCA. Although there were recidivist statutes on the books when Congress passed the ACCA in 1984 and amended it in 1986, Congress acted in response to a perceived need to augment inadequate state regimes for dealing with repeat offenders. The statute was intended "to supplement state prosecutions, not to supersede them." S. Rep. No. 98-190, at 10. But that world of inadequate state penalties for recidivism no longer exists. Over the intervening decades, various sentencing regimes, including state recidivism statutes and so-called "three strikes" laws, have become ubiquitous, often imposing harsh mandatory penalties. See Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. Legal Stud. 89, 89 (2001) (noting that twenty-four States enacted "three strikes and you're out" laws between 1993 and 1995). In addition, state and federal sentencing guidelines have taken on a more prominent role, with post-*Apprendi* developments changing the landscape even more dramatically.

Against this background, the application of recidivist enhancements to the ACCA has implications for federal and state laws that Congress never envisioned. In such circumstances, the Court should leave it to Congress to address ambiguities in the ACCA and to determine how that statute relates to increasingly robust state recidivist statutes and "*Blakely*-ized" sentencing guidelines. Application of the rule of lenity under these circumstances therefore would be especially attentive to the separation of powers concerns inherent in judicial extension of criminal penalties in the absence of clear legislative

authorization. As in all cases where the Court applies the rule of lenity, if the intent of Congress conflicts with the Court's reading, Congress can utilize the "simple remedy" of "insertion of a brief appropriate phrase, by amendment, into the present language" of Section 924(e)(2)(A)(ii). *Bifulco*, 447 U.S. at 401. See also William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991) (tracing the history of Congress's actions to clarify criminal statutory language subsequent to judicial application of the rule of lenity). If the square recidivism peg is to be fit into the round ACCA hole, "it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks." *Bifulco*, 447 U.S. at 401.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2007

56514

16 pgs

No. 06-1646

FILED

DEC 10 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GINO GONZAGA RODRIQUEZ,

Respondent,

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with a direct national membership of more than 12,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958. Its mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. In furtherance of this and its other objectives, NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1]

SUMMARY OF ARGUMENT

Insofar as the government is correct that the Armed Career Criminal Act ("the ACCA") directs this Court to determine the "maximum [punishment] to which the defendant was actually subject as a recidivist," Gvt. Br. 27, Mr. Rodriquez has ably explained why the statute's phrase "maximum term of imprisonment" must incorporate state statutory sentencing provisions that limited a defendant's actual sentencing exposure. Resp. Br. 38-45. NACDL files this brief to emphasize that the ACCA's term "offense" requires – even more fundamentally – the same result.

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from the parties are on file with the Clerk.

In determining whether a state offense was punishable by ten years, it is necessary to pin down exactly what offense the defendant was convicted of committing. States that have determinate sentencing systems such as Washington's divide each crime into two possible offenses: an ordinary offense and an aggravated offense. This Court's Sixth Amendment jurisprudence – most notably, *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) – dictates that when, as here, a defendant in such a system is convicted of an ordinary offense, then his maximum term of imprisonment is the top of the standard sentencing range. What is more, the top of a standard sentencing range in Washington does not change depending on the applicability of the recidivism enhancement at issue here. This enhancement heightens a defendant's actual sentencing exposure only when he is convicted of an aggravated offense, and the state court did not make such a finding here.

This same analysis makes sense under the ACCA. Congress left it up to states to determine which drug crimes are punishable by ten or more years, and the Washington Legislature has determined that ordinary drug crimes such as Mr. Rodriquez's prior convictions do not rise to that level of seriousness. There is nothing about this Court's modified categorical approach to ACCA predicates that makes it improper or practically difficult to give effect to this determination. Indeed, this Court must do so if it is to make sense of the majority of sentencing systems in the Ninth Circuit for purposes of assessing the government's position in this case.

ARGUMENT

A. The ACCA's Focus on the Particular "Offense" for Which the Defendant Previously Was Convicted Dictates that the Top of the Standard Range Is the Statutory Maximum for Ordinary Washington Offenses.

1. The Armed Career Criminal Act provides that an offender facing a felon-in-possession charge under 18 U.S.C. § 922(g) may be eligible for a fifteen-year mandatory minimum based on recidivism if the offender has previously been convicted of, as relevant here, a "serious drug offense." 18 U.S.C. § 924(e)(1). A "serious drug offense" is defined as "*an offense under State law* . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(ii) (emphasis added).

As is evident from the plain text of this provision, the key word in the statute is "offense." Until the offense is known, the maximum term of imprisonment "prescribed by law" for that offense cannot be determined.

This Court has issued a series of recent opinions clarifying what constitutes an "offense" for purposes of the criminal law. An "offense" is the collection of elements that defendant is convicted of or pleaded guilty to, and the facts that satisfy those elements. *See, e.g., Harris v. United States*, 536 U.S. 545, 562-63 (2002). When the presence of an "aggravating fact" allows an "increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a *greater offense*." *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000) (emphasis added); *see also Washington v. Recuenco*, 126 S. Ct. 2546, 2552 (2006); *Ring v. Arizona*, 536 U.S. 584, 604-05 (2002) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravated fact[,] . . . the core crime and the aggravating fact together constitute an

aggravated crime . . . *The 'aggravating fact is an element of the aggravated crime.'*") (quoting *Apprendi*, 530 U.S. at 501) (Thomas, J., concurring) (emphasis added).

Viewed through this lens, the Washington Legislature, in the Sentencing Reform Act of 1981 (the structure of which remains in effect today[2]), divided each of the felonies in the State's criminal code into two new and distinct offenses: an ordinary offense and an aggravated offense. All offenders convicted of an ordinary offense are subject to punishment pursuant to a grid that sets a minimum and maximum sentence based on the specific offense of conviction and the defendant's criminal history. *See* Wash. Rev. Code § 9.94A.310 (Tables 1 & 2) (sentencing grid & offense seriousness level) (1994); Wash. Rev. Code § 9.94A.350 (offense of conviction determines offense seriousness level) (1994); Wash. Rev. Code § 9.94A.360 (offender score) (1994).[3] Assuming that no aggravating facts have been alleged and found, Washington courts are required to sentence a defendant to a term no higher than the top of the prescribed standard range.

If, however, a court finds an "aggravating fact," thereby convicting the defendant of a greater, or

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[2] The Washington Sentencing Reform Act has been amended and recodified several times since its inception. *Amicus* cites to the statutes in effect at the time of Mr. Rodriquez's conviction, which are in all material respects the same as the current versions.

[3] Because the defendant's offender score takes account of prior convictions, the maximum sentencing range under the grid incorporates a defendant's recidivism. But in accordance with *Almendarez-Torres*'s admonition that a defendant's criminal history does not constitute an element of the offense, the recidivism is not used to calculate the defendant's offense level, which is determined solely by the crime of conviction itself. *See Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998); Wash. Rev. Code § 9.94A.350.

aggravated, offense, then the defendant is subjected to a higher sentence than is otherwise permissible. *See* Wash. Rev. Code § 9.94A.120 (1994); Wash. Rev. Code § 9.94A.390 (1994). An example of an aggravating fact is occupying a high position in a drug distribution hierarchy. Wash. Rev. Code § 9.94A.390(2)(d)(iv). When such an extra fact is found, the maximum sentence typically is set by Washington's umbrella statute – that is, the statute that establishes the longest sentence permissible for the applicable "class" of felony. *See* Wash. Rev. Code § 9.94A.120(14) (1994); Wash. Rev. Code § 9A.20.021 (1994).[4]

Thus, Washington has a simple two-tier system for determining the maximum sentence exposure for a prior conviction. For ordinary offenses, the maximum sentence is the top of the statutory sentence range. For aggravated offenses, the maximum is the term referenced in the umbrella statute. In other words, states with determinate sentencing schemes like Washington's have created systems in which umbrella statutes are not the sole determinative provisions in identifying statutory maximums.

This Court recognized this reality in *Blakely*. This Court held that the "statutory maximum" under Washington law for an ordinary offense – at least for purposes of the Sixth Amendment – is the top of the standard sentencing range when that is lower than the umbrella offense statutory maximum. *Blakely*, 542 U.S at 303-04; *see also Apprendi*, 530 U.S. at 483. Effect, and not form, must govern. *See Ring*, 536 U.S. at 602; *id.* at 610 (Scalia, J., concurring) (noting that the effect, rather than the label given, is significant);

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[4] There is one exception to this rule: Washington's determinate sentencing statutes provide that if the maximum of defendant's sentence range in the sentencing grid exceeds the maximum sentence available under the statute classifying defendant's offense, then the latter "shall be" the maximum for purposes of defendant's sentence range. Wash. Rev. Code § 9.94A.420 (1994).

Washington v. Recuenco, 126 S. Ct. 2546, 2552 (2006) (making same point). And the top of the standard range defines the real sentence ceiling for defendant's offense of conviction.

It is irrelevant under this analysis whether a recidivist statute doubles the umbrella statute's outer limit for the crime at issue. Recidivist enhancements affect a defendant's exposure only for an aggravated offense. When a defendant is found guilty only of an ordinary offense, the defendant's maximum sentence remains the top of his mandatory sentencing range. *See* Wash Rev. Code § 9.94A.120; *In re Cruz*, 157 Wash.2d 83, 134 P.3d 1166 (2006) (for purposes of Wash. Rev. Code § 69.50.408(1), prior offense doubles the statutory maximum sentence for the offense class and not the standard sentencing range).[5]

2. In this case, Mr. Rodriquez was convicted of and sentenced for ordinary drug possession and distribution, under Wash. Rev. Code § 69.50.401(a)(D)-(F) (1994). *See, e.g.*, J.A. 43.[6] The umbrella statute had a five-year maximum, and, accounting for his prior drug convictions by applying the recidivism penalty, his statutory maximum for an aggravated offense was ten years. *See* Wash. Rev. Code § 69.50.408(a). But

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[5] The dramatic differences between Washington's Sentencing Reform Act and the federal sentencing guidelines – most notably that the former is statutory and mandatory and the latter are administrative and advisory – render inapposite the government's extended discussion that the ACCA should not turn on the federal guidelines' maximums. *See* Gvt. Br. 31-32; *cf. Cunningham v. California*, 127 S. Ct. 856, 870 (2007) (noting that California's mandatory determinate sentence laws "do not resemble the [federal] advisory system").

[6] Mr. Rodriquez was sentenced to three offenses at the same time, to run concurrently. *See* J.A. 21, 47, 98. *Amicus* therefore refers here to the sentencing range for the first of his two equally most-serious offenses, Conviction No. 95-1-01070-0. *See* J.A. 21; *cf.* J.A. 98.

because the trial court did not find any aggravating facts associated with Mr. Rodriquez's conviction, his *offense of conviction* was an ordinary drug crime. This offense carried a seriousness level "IV" under Washington's Sentencing Reform Act and his offender score was "7", making his statutory sentencing range 43 to 57 months. J.A. 16, 42; *see also* Wash Rev. Code § 9.94A.310 (1994). To put it in plain terms: the upper limit to which Mr. Rodriquez could actually be sentenced for his offense was a legislatively prescribed statutory maximum of 57 months.

As a result, insofar as the government is correct that the exercise for the ACCA purposes is to determine the "maximum [punishment] to which the defendant was actually subject as a recidivist," Gvt. Br. 27, Mr. Rodriquez's maximum had to be 57 months. It does not matter that another Washington statute – be it the umbrella statute or the recidivist enhancement – purported to set a higher statutory maximum. To borrow this Court's language in *Blakely,* the "'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." *Blakely*, 542 U.S. at 304.

Indeed, this method of pinpointing statutory maximums in the context of applying sentencing enhancements such as the ACCA has origins pre-dating *Apprendi.* In *United States v. R.L.C.,* 503 U.S. 291 (1992), this Court stated that the most "natural construction" of a statute whose application turned on a statutory maximum determination, as the ACCA does here, was to "apply[] *all statutes with a required bearing on the sentencing decision, including* not only those that empower the court to sentence but *those that limit the legitimacy of the exercise of that power.*" *Id.* at 298 (emphasis added). And to the extent that the ACCA is ambiguous as to which statutory maximum to use when the statutes appear to create more than one,

the rule of lenity requires "choos[ing] the construction yielding the shorter sentence." *Id.* at 305.

B. Treating the Top of the Standard Range as the Statutory Maximum for Ordinary Washington Offenses Is Consistent With This Court's Modified Categorical Approach to the ACCA.

Looking to the maximum sentence a defendant actually could have received for his conviction under the Washington statutory system to determine whether that offense qualifies as an ACCA predicate is no more difficult, and no less categorical, than the approach the government is advocating. A district court making that determination with respect to a prior Washington conviction need only look at the state judgment and sentence. *See, e.g.*, J.A. 16, 42, 93 (¶ 2.3) (listing offense seriousness level, offender score, and sentence range). If no aggravating facts were found, meaning that defendant was convicted for an ordinary offense, then the district court would use the top of the defendant's sentence range as the "maximum term of imprisonment" for purposes of the ACCA. *See id.*

If instead defendant was convicted of an aggravated offense, the defendant's judgment and sentence, and accompanying attachments, themselves will reflect the presence of an aggravator. J.A. 16, 42, 93 (¶ 2.4) (providing box for judge to check if grounds existed for "exceptional sentence"). The statutory maximum for that aggravated offense will be the cap set by the umbrella statute for the offense of conviction, which will always be reflected on the face of the Judgment and Sentence pursuant to local court rules. *Id.* (¶¶ 2.3, 2.4); Wash. Crim. Rule 7.2(d) (requiring all courts to use a uniform judgment form and set forth all findings of aggravated circumstances in imposing an aggravated-offense punishment). In either instance, the district court merely looks to documents that this Court has already held proper to consider. *See, e.g., Shephard v. United States*, 544 U.S. 13, 16 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

The government suggests that there might be hypothetical cases in which a judge found aggravating circumstances but chose not to apply an enhanced sentence, and that a defendant's statutory sentencing range could not be used for the ACCA analysis in such a case. *See* Gvt. Br. 33 n.11. But this is an illusory problem. In the unusual circumstance that a court made an oral finding that a defendant qualified for an above-range sentence but failed to memorialize that finding in writing and imposed a within-range sentence, that finding would nevertheless be recorded in the sentencing transcript. (Under Washington's now *Blakelyized* sentencing system, that finding would be present in the jury verdict. *See* Wash. Rev. Code §§ 9.94A.537(1)-(2)) (2006). In any event, the fact that the government may not be able to use every possible predicate conviction for purposes of the 18 U.S.C. § 924(e)(ii) ACCA enhancement due to the failure of a particular state court to make those on-the-record findings is a deficiency that is no different than the government's inability to prove the "generic" burglary elements for proof of a "violent felony" under § 924(e)(2)(B)(ii) in *Taylor*. *Cf. Taylor,* 495 U.S. at 601.

The government also posits that Congress could not have anticipated the manner in which this Court's *Apprendi* and *Blakely* jurisprudence would construe sentencing systems such as Washington's. *See* Gvt. Br. 31. This is a questionable assertion in light of the fact that all this Court did in *Apprendi* was to follow "the uniform course of decision during the entire history of our jurisprudence." *Apprendi,* 530 U.S. at 490. Moreover, in enacting the ACCA, Congress likely did not know how *any* particular state sentencing systems worked, much less which drug offenses each of the states made punishable by ten years. Congress, following federalist impulses, simply set ten years as a mark of general seriousness, and left it to the states to decide when that threshold is satisfied.

But the government's argument ultimately is irrelevant. Even if Congress did know what state crimes at the time of the statute's enactment fell within and outside of the ACCA, it is quite a leap to suggest that state legislatures making subsequent adjustments that remove certain drug crimes from the Act's purview are illegitimate. The Washington Sentencing Reform Act is nothing more than just such a statutory adjustment that created aggravating and non-aggravating crimes through the punishments it set – and that removed the latter from the ACCA with respect to offenses with standard ranges below 10 years.

C. Considering the Effect of Standard Sentences in States Such as Washington Is Essential to Resolving the Question Presented.

The government goes out of its way to accuse Mr. Rodriquez of forfeiting the argument discussed herein and to encourage this Court to avoid the issue. *See* Gvt. Br. 28. As Mr. Rodriquez already has explained, however, this Court has ample authority to reach the argument and indeed must do so if it desires coherently to address the government's own conception of the ACCA. Resp. Br. 38-39, 45 n.22.

NACDL wishes to add, however, that it also is pragmatically critical that this Court reach this argument. The overwhelming majority of defendants convicted of crimes within the Ninth Circuit, where this case comes from, are (or, more important for present purposes, were) subject to determinate sentencing systems such as Washington's. Prior to this Court's *Blakely* decision, six of the nine states in the Ninth Circuit maintained such systems: Washington, California, Oregon, Arizona, Alaska, and Hawaii.[7]

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[7] *See Blakely*, 542 U.S. 296 (Washington system); *Cunningham v. California*, 127 S. Ct. 856 (2007); *State v. Dilts*, 103 P.3d 95 (Or. 2004); *State v. Brown*, 99 P.3d 15 (Ariz. 2004); *Milligrock v. State*,

Only three states with relatively small populations – Idaho, Montana, and Nevada – maintained different kinds of systems.[8] It would resolve little for this Court to decide this case as if the question how Washington's Sentencing Reform Act affects the analysis were waived. Indeed, it would be far better for this Court to say nothing at all about how the ACCA operates in a case such as this than artificially to exclude such a vital component of the analysis.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

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118 P.3d 11 (Alaska Ct. App. 2005); *State v. Maugaotega*, 168 P.3d 562 (Haw. 2007).

[8] Even after *Blakely*, five of the nine overall states still maintain determinate sentencing systems (albeit now with heightened procedural protections). Only California has switched to a different kind of system, under a two-year provisional system designed to track this Court's federal-guidelines jurisprudence until further study can be conducted. *See* Cal. Stats. ch. 7 (Sen. Bill No. 40) (2007).

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December 10, 2007

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BPP

No. 06-1646

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GINO GONZAGA RODRIQUEZ,

Respondent.

On Writ Of Certiorari to the United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF INTEREST[1]

Amici curiae are professors who teach criminal law courses at law schools in the United States, and as such they have a professional interest in ensuring that federal criminal statutes are interpreted in a manner that coherently advances their purposes and is consistent with relevant constitutional principles. In particular, *amici curiae* submit this brief to highlight the theoretical incoherence of interpreting the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(A), by reference to state recidivism statutes, as well as the undesirability of interpreting the ACCA in a way that expands the constitutionally suspect practice of increasing applicable maximum sentences through judicial factfinding concerning prior criminal convictions.

ARGUMENT

POINT I

THERE IS A FUNDAMENTAL CONCEPTUAL FLAW IN DETERMINING THE SERIOUSNESS OF A PARTICULAR DRUG OFFENSE BY REFERENCE TO A RECIDIVISM STATUTE

This case asks whether Congress intended that the determination whether a particular State drug

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici, or their counsel, made a monetary contribution to its preparation or submission.

Both parties have consented to the filing of this brief.

offense is a "serious drug offense" under the ACCA—defined as one carrying a "maximum term of imprisonment of ten years or more"—should turn on the panoply of State recidivism sentencing rules appearing in various State statutes and guidelines.

Both the language of the ACCA and its legislative history make clear that Congress intended to identify a narrow and specific class of intrinsically serious State drug offenses, *not* merely a broad category of crimes that—for whatever reason—gave rise to sufficiently lengthy potential sentences. Congress's reasons for this narrow focus included a desire to avoid unnecessary federalization of State criminal law as well a concern about imposing the harsh penalties of the ACCA only on the most deserving of serious offenders. These concerns led Congress to enact a statutory text expressly delimiting the ACCA's application to a class of "serious" drug offenses; it then utilized the maximum sentence prescribed by State law for the particular offense as a proxy for assessing a State's judgment as to the seriousness of particular drug offenses.

The Government's proposed incorporation of State recidivism enhancements into this definition suffers from a fundamental incoherence. Recidivism statutes typically reflect views about how to punish recidivism and how to deal with repeat offenders, *not* a State's judgment about the seriousness of particular crimes. *See generally* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277 (2005). Incorporating such statutes into the calculation of the maximum term of imprisonment would therefore confound Congress's effort to specify

only types of drug offenses a State deems particularly serious. Moreover, contrary to the intended function of the ACCA, this approach would sweep many minor prior drug offenses into the ambit of the ACCA and risk undermining the very federalism principles that the ACCA sought to respect.

A. Congress In The ACCA Sought To Identify A Specific Category Of Drug *Offenses* The States Deemed Serious

The addition of "serious drug offense[s]" as predicate crimes under the ACCA was accomplished by the Career Criminals Amendment Act of 1986. That Act aimed to single out a particular class of offenses by a carefully considered reference to State drug offenses "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance ... for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). Notably, Congress did not incorporate all drug offenses, or even all drug trafficking offenses, as predicate offenses under the ACCA; rather it sought to identify a subset of the most serious such offenses. Whether a crime would be treated as a "serious drug offense" would therefore be determined by looking at the sentences State legislatures imposed for the particular *offense*. Congress included no reference, in identifying such offenses, to the characteristics or criminal history of the particular *offender*.

This definition was carefully chosen. Serious drug offenses were initially defined in the proposed legislation only by reference to federal law, as

"offense[s] under the Controlled Substances Act or the first section of Public Law 96-350, for which a maximum term of imprisonment of ten years or more is prescribed by law." Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 6 (1986) (hereinafter "House Hearing"). In considering how to define serious State drug offenses, Representative Lawrence J. Smith noted the possibility of focusing on the punishment prescribed by the State as a proxy for how serious the State considered the drug offense. *See* id. at 39 ("perhaps [Congress] can use the categories of the punishment which the crime originally called for as a guide"). Congress eventually selected, as that proxy, offenses carrying at least a ten year maximum sentence.

It is well-established, moreover, that the ACCA was shaped by an express desire to have it apply only to a limited category of particularly serious offenses. In enacting the statute, one of Congress's principal concerns was to limit any intrusion upon the traditional state and local prosecutorial function. Congress envisioned ACCA to be a "safety net," with the "central purpose of [seeking] to *supplement* state prosecution," not displace it. S. Rep. No. 97-585, at 8, 65 (1982) (emphasis added). This is plainly expressed in materials from both legislative chambers. *See, e.g.*, S. Rep. No. 98-506, at 2 (1983) (statement of Senator Specter); Hearing on H.R. 1627 and S. 52 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 19 (1984). This concern carried over to the 1986 Career Criminals Amendment Act of 1986, where one "major principle[]" that Congress kept in mind

was not to "do any damage to the entire concept of federalism," and as a result to "prioritize" offenses. House Hearing at 11.

Thus, the selection of predicate offenses that would trigger the application of the ACCA was shaped by: (1) a desire not to intrude too far into the primary responsibility of the States for criminal law enforcement, and (2) a concern that the ACCA's severe enhanced penalties might be imposed as a consequence of the commission of prior State crimes not deemed sufficiently serious by the States themselves.[2] For example, the original definition of the crime of violence predicate offense was limited by the addition of the phrase "punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 924(e)(2)(B), based on the concern that the original definition could potentially "include simply misdemeanors." S. Rep. No. 99-797, at 10 (1986) ("I would suggest that the Senator may want to consider limiting the prior convictions to those situations where the prior offense involved a crime which was punishable by a term of 1 year or more in prison; not necessarily that the person received a

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[2] *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in original).

felony sentence, but that *the offense itself was of a serious enough nature* that a felony sentence could have been imposed ....") (emphasis added).

Likewise, concerns were expressed that drug possession crimes would be swept into the definition of a serious drug offense, which led to the insertion of the language requiring that such offense "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute." 18 U.S.C. § 924(e)(2)(A)(ii); *see* House Hearing at 26 ("The concern that is raised is that we may be picking up, by the nature of how we drafted this legislation, a person who is just simply a user rather than a distributor and that maybe we ought not to be considering that person to be a career criminal.").

In addition, in response to such concerns—at a time when the proposed legislation still covered only federal drug offenses—Deputy Assistant Attorney General James Knapp emphasized that "the Federal Government only gets involved in the most serious drug offenses, offenses involving very large quantities, we just don't apply any of those statutes to your typical user." *Id.* at 27. He additionally stated that "any reservation expressed in legislative history to the effect that we should consider as prior convictions only those convictions involving a *significant* quantity of drugs, I think, would be an appropriate reservation." *Id.* (emphasis added). This reservation necessarily applies equally to State drug offenses, further emphasizing Congress's intention to include only the most serious of offenses.

In short, the legislative history of the ACCA reinforces the importance of the text's reference to

"serious" drug offenses and clearly reveals congressional intent to impose severely enhanced federal sentences on defendants previously convicted of only "*major* State ... drug trafficking felonies." H.R. Rep. No. 99-849, at 1, 4 (1986). *Cf. Logan v. United States*, No. 06-6911, --- S. Ct. ---, 2007 WL 4232786 (Dec. 4, 2007) (referencing congressional purposes in interpreting the reach of the text Congress used to define other ACCA predicates).

B. State Recidivism Laws Reflect Judgments About Repeat Offenders, Rather Than About The Seriousness Of Underlying Offenses

The incorporation of State recidivism laws into the ACCA's definition of "serious drug offense[s]" would confound, rather than advance, the purpose of identifying the offenses deemed by the States to constitute major drug trafficking felonies. Such recidivism laws often increase the penalty for numerous offenses, even very minor offenses, and ultimately express judgments about the seriousness of repeat offending, rather than about the seriousness of the underlying offenses.

Nearly every state and the District of Columbia currently have some form of recidivism law on the books. *See generally* Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 73 U. CIN. L. REV. 1609, 1618-20 (2005) (noting that "all states have laws enhancing the sentences of recidivist offenders" and "[t]wenty-six states have 'three strikes and you're out' laws, potentially providing for life in prison upon a third felony conviction"); *see also Parke v. Raley*, 506 U.S. 20, 26 (1992) ("Statutes that punish recidivists more

severely than first offenders . . . currently are in effect in all 50 States.") (citing DEPARTMENT OF JUSTICE, STATUTES REQUIRING THE USE OF CRIMINAL HISTORY RECORD INFORMATION, 17-41 (June 1991)). Such laws serve a number of penological purposes, as commentators, numerous State courts, and this Court have recognized. In general, the overriding purpose of these laws is to "'deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.'" *Ewing v. California*, 538 U.S. 11, 27 (2003) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284 (1980)).

Thus, many states adopted recidivism laws primarily "to deter felony offenders . . . from committing subsequent felony offenses." *State v. Wyne*, 460 S.E.2d 450, 453 n.7 (W. Va. 1995).[3] Other states cite incapacitation as the purpose of their recidivism statutes. *See, e.g.*, James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 8 (2000) (explaining that framers of California law intended to identify and "isolate [habitual offenders] to eliminate repeat behavior"); *State v. Pierce*, 283 N.W.2d 6, 11 (Neb. 1979) (quoting *Ansell v. Commonwealth*, 250

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[3] *See also, e.g.*, *State v. Freeman*, 705 N.W.2d 286, 288 (Iowa 2005); *State v. Driggs*, 745 P.2d 135, 137 (Ariz. 1987); *Montone v. State*, 521 A.2d 720, 725 (Md. 1987); *State v. Conley*, 222 N.W.2d 501, 503 (Iowa 1974).

S.E.2d 760, 761 (Va. 1979)) (noting that recidivist statutes "'protect society against habitual criminals'"), *overruled on other grounds*, *State v. Ellis*, 333 N.W.2d 391 (Neb. 1983). Incapacitation has been viewed as an increasingly important objective for recidivism laws in light of the mounting evidence suggesting that a small handful of offenders commit the vast majority of crimes. Thus, it is hoped that recidivism laws successfully targeting and isolating a core group of repeat offenders might have a significant impact on crime rates.

State legislatures crafting and revising broadly-applicable recidivism laws are not engaged in the business of evaluating the relative seriousness of various crimes. Rather, their attention is focused on habitual offenders, evaluating the penalties required to deter certain types of offenders from further crimes or determining the best means of identifying and incapacitating them. Legislators are primarily seeking not "to deter the commission of specific crimes, but to reduce crime in general" by zeroing in on these repeat offenders. Ardaiz, *supra* at 12.

Examination of State recidivism statutes themselves confirms that the primary focus often is not on the seriousness of the offense. For example, California's Three Strikes Law by its own terms does not require "that the new criminal behavior [triggering the recidivism statute] be necessarily serious or violent." *Id.* at 8. As this Court noted, the "California legislature therefore made a deliberate policy decision . . . that the gravity of the new felony should not be a determinative factor in triggering the application of the Three Strikes Law." *Ewing v. California*, 538 U.S. at 30 n.2 (internal quotation

marks omitted). Similarly, many states provide for an automatic doubling of the authorized prison term for anyone convicted of a subsequent crime under their controlled substance law. *See, e.g.*, MD. CODE ANN., CRIM. LAW, § 5-905 (West 2007); D.C. CODE § 48-904.08 (2007); 720 ILL. COMP. STAT. ANN. 570/408 (West 2007); LA. REV. STAT. ANN. § 40:982 (2007); N.J. STAT. ANN. § 24:21-29 (West 2007); WASH. REV. CODE ANN. § 69.50.408 (West 2007). This blanket doubling of all drug offenses by its nature avoids making a judgment about the seriousness of any particular drug offense.

In short, recidivism statutes primarily reflect judgments about the seriousness of repeat offending and the best means to address it, whether through deterrence or incapacitation. They do not meaningfully reflect judgments about the seriousness of particular offenses. Introducing recidivism enhancements into the calculation of the "maximum term of imprisonment prescribed by law" under the ACCA is therefore of no aid in identifying those offenses deemed most serious by States. Since recidivism laws convey no information relevant to that inquiry, they merely add noise, interfering with the purpose for which the ACCA uses the maximum term and upsetting the delicate balance created by Congress.

C. Incorporating Recidivism Laws Into The Interpretation Of "Serious Drug Offense" Would Produce Absurd Results And Place Great Burdens On Lower Federal Courts

Looking to State recidivism laws to determine the applicability of the ACCA will also necessarily lead to absurd results highly unlikely to have been intended

by Congress. It also will further complicate the work of federal district judges, who will be required in many federal sentencing proceedings to analyze intricate, diverse and often evolving state recidivism legislation.

Some state recidivism laws double, or triple, the maximum term of imprisonment for a defendant's second drug offense.[4] Because of the multiplier effect of state recidivist statutes, certain drug offenses that both the state legislature and Congress generally view as non-serious can be subject to long sentencing terms otherwise provided only for major drug trafficking offenses. In South Dakota, for example, possession with intent to deliver a Schedule III controlled substance, defined as those drugs with less potential for abuse than Schedules I and II drugs and having an approved medical use in the United States, is punishable by a maximum term of five years. S.D. CODIFIED LAWS § 22-42-3. Thus, unlawful distribution of Schedule III drugs such as codeine or herbal remedies with ephedrine by a defendant with a single

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[4] *See, e.g.*, CONN. GEN. STAT. ANN. § 21a-277(b) (first drug offense may be punished by up to seven years; second offense by up to fifteen years); IDAHO CODE ANN. § 37-2732(a) (second time drug offender may punished for up to twice the term authorized for first time offender); 720 ILL. COMP. STAT. ANN. 570/408(a) (same); IND. CODE ANN. § 35-50-2-8 (h) (habitual offenders may punished up to three times the term authorized for first offenders); IOWA CODE ANN. § 124.411(1) (second drug offense may be punished by up to three times the term authorized for first drug offense).

prior felony conviction may be bootstrapped into an offense technically punishable by a sentence up to ten years. Especially in light of the ACCA's legislative history, it is hard to believe that Congress intended that a state crime involving the unlawful distribution of certain herbal remedies could be the predicate for the severe sentencing enhancements set out in the ACCA.[5]

Further, as this very case and other ACCA cases on the Court's docket this Term document, figuring out the precise scope and reach of recidivism enhancements presents many legal and factual challenges. Lower federal courts frequently struggle (and often reach disparate results) when forced to determine the precise reach and application of *federal* recidivism enhancements. The government's proposed interpretation of ACCA to include State recidivism provisions would mean that lower federal courts would regularly have another 50 more or more recidivism puzzles to decipher when sentencing repeat offenders. For under the government's

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[5] In addition to serious drug offenses, violent felonies also qualify as predicate offenses under the ACCA. 18 U.S.C § 924(e). Thus a rule incorporating state recidivism enhancements arguably could apply not only to serious drug offenses but also to the definition of a violent felony "punishable by imprisonment for a term exceeding one year." *Id.* If courts incorporate state recidivism laws into the definition of a violent felony, it could permit an extraordinary array of petty State offenses to count as predicate ACCA offenses if and when committed by any person with a prior conviction.

interpretation, federal district judges would not merely have to determine if a particular defendant was *in fact* previously sentenced under a state recidivism provision, but rather would have a broader obligation to research and determine if that defendant *was possibly subject* to a state recidivism provision that could have increased his sentencing exposure for a prior drug offense to 10 years or more. The legal complications and burdensome litigation that would flow from this interpretation of the ACCA are daunting.

A number of criminal law scholars have recently discussed the extraordinary legal complications presented by the diversity of State recidivism laws. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005); Dan Markel, *Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law*, 4 OHIO ST. J. CRIM. L. 573 (2007). Professor Logan's article details at length the "significant practical challenges and consequences," the "interpretive challenges," and the "unequal treatment" that necessarily flows from a jurisdiction's efforts to make use of a foreign jurisdiction's recidivism rules. Logan, *supra*, at 292-307.

In the context of the government's proposed ACCA interpretation, these practical challenges will be especially severe given many recent State reforms of recidivism laws. Within recent years, many States have enacted or revised its recidivism laws. *See, e.g.*, John Clark, *et al.*, *"Three Strikes and You're Out": A Review of State Legislation*, U.S. Dep't of Justice, Nat'l Inst. of Justice (Sept. 1997) (cataloguing that between 1993 and 1995, twenty-four states enacted

"three strikes" laws); Ryan King, The Sentencing Project, *Changing Direction? State Sentencing Reforms 2004-2006* (Mar. 2007), *reprinted at* 19 Fed. Sent'g Rep. 253 (2007) ("Between 2004 and 2006, at least 22 states enacted legislative reforms to their sentencing policies, or adopted policy changes affecting probation and parole revocation procedures."); Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 723 n.51 (2006) (noting trend toward enactment of "three strikes" laws) The government fails to explain, and perhaps even to consider, the serious constitutional and practical questions surrounding when and how changing state recidivism laws are to be assessed—*i.e.*, should evolving State recidivism laws be assessed (a) at the time of federal sentencing for the new federal offense, (b) at the time of the new federal offense, (c) at the time of the prior State sentencing for the prior State drug offense, or (d) at the time of the prior State drug offense.

POINT II

TITLE 18 U.S.C. § 924(E)(2)(A)(II) SHOULD BE INTERPRETED IN A MANNER THAT MINIMIZES THE SERIOUS CONSTITUTIONAL CONCERNS RAISED BY JUDICIAL FACT-FINDING REGARDING RECIDIVISM

The incorporation of State recidivism laws into the interpretation of "serious drug offense" should also be avoided for another reason: such incorporation would needlessly and inappropriately implicate the constitutionally questionable practice of judicial

factfinding concerning the nature and import prior State offenses.

As recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the fact of a prior conviction is the only recognized exception to the general rule that "'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact ... that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" Id. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)). This "prior conviction" exception is based on the holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a ruling that has been subsequently questioned by a majority of Justices. *See, e.g., Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in judgment) (asserting that "*Almendarez-Torres* ... has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided") (citing *Almendarez-Torres*, 523 U.S. at 248-49 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting), *Apprendi*, 530 U.S. at 520-21 (Thomas, J., concurring)). *See also Rangel-Reyes v. United States*, 126 S. Ct. 2873, 2874-75 (2006) (Thomas, J., dissenting from denial of a writ of certiorari) ("[I]t has long been clear that a majority of this Court now rejects [the prior conviction] exception.").

Regardless of the continued validity and vitality of the prior conviction exception, it is clear that the government's ACCA interpretation would require

judicial fact-finding that will often have to go considerably beyond just taking judicial notice of the mere facts of a defendant's prior convictions. As Respondent's brief explains in detail, incorporating state recidivism laws into the interpretation of "serious drug offense" would require courts to engage in a particularly difficult version of such judicial factfinding concerning prior convictions. *See* Brief for Resp., Section II.A.2, pp. 27-32. Especially in light of this Court's recognition in *Shepard* of constitutional concerns raised by making finding beyond the mere fact of a prior conviction, see 544 U.S. at 18-19, this Court likewise should not impose on lower court judges a virtual obligation to engage in constitutionally questionable factfinding relating to prior convictions. *Cf.* Colleen P. Murphy, *The Use of Prior Convictions After* Apprendi, 37 U.C. DAVIS L. REV. 973 (2004) (spotlighting the broad array of *Apprendi*-implicated facts and factors that can be raised by sentencing enhancements triggered by prior convictions). Of course, the most significant constitutional concerns would be avoided by interpreting the ACCA not to incorporate State recidivism laws, and instead limiting judges to the more limited and straightforward inquiry needed to determine that a defendant committed the predicate offense and that that offense carried a particular statutory penalty. In keeping with its established practice, this Court should interpret the ACCA so as to reduce or avoid these constitutional difficulties. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("[The canon of constitutional avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not

intend the alternative which raises serious constitutional doubts.")

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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